No. 06-11206

Title:	Deondery Chambers, Petitioner v. United States
Docketed:	May 15, 2007
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(06-2405)
Decision Date:	January 9, 2007
Rehearing Denied:	February 16, 2007

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 8 2007	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 14, 2007)
Jun 6 2007	Order extending time to file response to petition to and including July 16, 2007.
Jul 16 2007	Brief of respondent United States in opposition filed.
Jul 25 2007	Reply of petitioner Deondery Chambers filed.
Jul 26 2007	DISTRIBUTED for Conference of September 24, 2007.
Oct 1 2007	Letter of September 27, 2007, from counsel for petitioner received.
Nov 29 2007	DISTRIBUTED for Conference of January 4, 2008.
Apr 16 2008	DISTRIBUTED for Conference of April 18, 2008.
Apr 21 2008	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
May 9 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 7, 2008.
Jun 30 2008	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including July 30, 2008.
Jun 30 2008	The time to file respondent's brief on the merits is extended to and including September 29, 2008.
Jul 30 2008	Joint appendix filed. (Volume I) (Statement of Costs filed).
Jul 30 2008	Motion of petitioner for leave to file Volume II of the joint appendix Under Seal. (Twenty Copies (CL Page 155)
Jul 30 2008	Brief of petitioner Deondery Chambers filed. (Distributed)
Aug 8 2008	CIRCULATED.
Aug 12 2008	Record received from the U.S.C.A. for the 7th Circuit. (1 envelope)
Aug 15 2008	Record received from the U.S.D.C. for the Southern District of Illinois. (1 envelope)
Aug 18 2008	SET FOR ARGUMENT ON Monday, November 10, 2008.

Aug 20 2008	Motion DISTRIBUTED for Conference of September 29, 2008.
Sep 29 2008	Brief of respondent United States filed. (Distributed)
Oct 6 2008	Motion for leave to file volume II of joint appendix Under Seal. GRANTED.
Oct 15 2008	Letter and attachment received from the Solicitor General. (Distributed).
Oct 24 2008	Reply of petitioner Deondery Chambers filed. (Distributed)
Nov 5 2008	Letter from counsel for the respondent proposing to lodge copies of the newly issued USSC Report on Federal Escape Offenses in Fiscal Years 2006 & 2007.
Nov 6 2008	Lodging approved. (Distributed).
Nov 10 2008	Argued. For petitioner: Robert N. Hochman, Chicago, Ill. For respondent: Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

DUOC

No. 06- 11204

IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 8, 2007

QUESTION PRESENTED

Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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IN THE

Supreme Court of the United States

No. 06-

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Deondery Chambers respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on January 9, 2007. It has been officially reported and can be found at *United States* v. *Chambers*, 473 F.3d 724 (7th Cir. 2007). It is reproduced in the Appendix at 1a-7a. The district court held a sentencing hearing on May 12, 2006 at which the judge orally ruled that the defendant's prior conviction for escape under Illinois law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The relevant portion of the transcript is reproduced in the Appendix at 18a-27a.

JURISDICTION

The court of appeals issued its opinion on January 9, 2007. Petitioner timely sought rehearing, which was denied on February 16, 2007. Pet. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. 924(e) provides, in pertinent part, as follows:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection—
>
> * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

This case presents a mature split of authority regarding a recurring issue that members of this Court have recently acknowledged requires this Court's attention. The Armed Career Criminal Act ("ACCA") provides an enhanced 15 year mandatory minimum sentence, and up to life imprisonment, for anyone guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), who had previously been convicted of three serious drug and/or violent felonies. 18 U.S.C. § 924(e). Without the ACCA enhancement, the statutory maximum sentence for a violation of § 922(g)(1) is ten years.

The Courts of Appeals have diverged over whether a prior conviction for escape based on a failure to report to confinement is a "violent felony" within the meaning of the ACCA. Unlike a prison break from secure custody, a failure-to-report escape does not involve breaking free from the physical custody of an officer of the state or a secure detention facility. Failure-to-report escapes occur when a detainee is, for any of a number of reasons, provided the opportunity to move about the community without supervision for a limited period of time, but fails to return or report to his or her facility within the appointed time. It is a crime of omission.

There is a 10 to 2 split of authority on whether all escapes should be treated as violent crimes for purposes of career offender status. The Ninth Circuit has held that a failure-to-report escape is not a violent crime. *United States* v. *Piccolo*, 441 F.3d 1084, 1088-90 (9th Cir. 2006). The D.C. Circuit has also indicated that it would not treat a failure-to-report escape as a violent crime, and recognized that failure-to-report escapes are different from both prison breaks from secures facilities and escapes from the physical custody of an officer. *United States* v. *Thomas*, 333 F.3d 280, 282-83 (D.C. Cir.

2003).[1] In the decision below, Judge Posner acknowledged "[a]s an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often 'involves conduct that presents a serious potential risk of physical injury to another.'" Pet. App. 2a (quoting *United States* v. *Golden*, 466 F.3d 612, 616-17 (7th Cir. 2006) (Williams, J., dissenting)). But the Seventh Circuit panel below was bound by prior Seventh Circuit decisions which had held that all escapes are violent crimes. *Id.* Nine other circuits have so held. *United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States* v. *Rivera*, 127 F. App'x 543, 545 (2d Cir. 2005) (citing *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002)); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002); *United States* v. *Mathias*, No. 06-4109, 2007 WL 1097952, at *3-5 (4th Cir. Apr. 13, 2007); *United States* v. *Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999); *United States* v. *Anglin*, 169 F. App'x 971, 975 (6th Cir. 2006) (citing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999)), *cert. denied*, 127 S. Ct. 1249 (2007); *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States* v. *Gay*, 251 F.3d 950, 952-55 (11th Cir. 2001) (per curiam).

This well developed split of authority warrants this Court's review, especially in light of this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007). The relevant provision of the ACCA defines "violent felony" by reference to a list of specific, enumerated offenses (burglary, arson, extortion or crimes involving the use of explosives). 18 U.S.C. § 924(e)(2)(B)(ii). The ACCA also includes a residual provision, covering any unenumerated felony that "otherwise involves conduct that presents a serious potential risk of

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[1] *Thomas* involved an escape from the physical custody of an officer, not a failure to report. 333 F.3d at 282-83. As a result, the D.C. Circuit did not have an occasion in *Thomas* to apply its view that failure-to-report escapes "may not inherently create a risk of harm to others." *Id.* at 283.

physical injury to another." *Id.* Because *James* involved a crime analogous to an enumerated offense (attempted burglary), the majority opinion declined to provide a standard for determining whether an offense that is not analogous to an enumerated offense is a "violent felony" within the meaning of the ACCA. *James*, 127 S. Ct. at 1598. The dissenting opinion argued that leaving such a substantial gap in the interpretation of a frequently invoked federal criminal statute ill serves courts and counsel. *Id.* at 1601-02 (Scalia, J., dissenting). The majority did not disagree that this Court's guidance is needed. It merely noted that a case involving a crime analogous to an enumerated offense was not an appropriate vehicle for an opinion that provides a standard for determining when a crime that is not analogous to an enumerated offense is a "violent felony."

This case is an excellent vehicle to address this substantial gap in the interpretation and application of the ACCA. Failure-to-report escapes occur frequently, and as the body of appellate decisions ruling on whether such escapes are violent crimes indicates, they are often relied upon to support an enhanced sentence for armed career offenders. Failure-to-report escapes are not analogous to any of the crimes specifically enumerated as violent felonies in the ACCA. There is no ambiguity in the record that petitioner's prior conviction for "escape" under Illinois law was for a failure to report to confinement, not a physical break from a secure facility or the custody of a state official.

In short, this case provides a strong vehicle for this Court to address a question of statutory interpretation that its own recent decision indicates is urgently needed. There is a well developed split of authority on the question that, as Judge Posner's opinion indicates, will persist by force of circuit precedent in the absence of action by this Court. The petition should be granted.

1. Petitioner pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Pet. App. 1a. The

indictment also charged that petitioner had violated 18 U.S.C. § 924(e), the ACCA provision that provides for a mandatory minimum sentence of 15 years in prison for those violating § 922(g) who have previously committed three serious drug and/or violent felonies. *Id.* at 15a. The prosecution subsequently filed an information identifying the three predicate convictions it claimed were qualifying felonies under the ACCA that supported sentencing under 18 U.S.C. § 922(e). One of the convictions was for escape under Illinois law on June 30, 1999. *Id.* at 16a.

Illinois law defines an escape to include both breaking free from physical confinement (one who "escapes from any penal institution or from the custody of an employee of that institution") and also failure-to-report escapes (one who "knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement"). 720 ILCS 5/31-6(a). There is no dispute that Chambers's "escape" was a failure-to-report, the Illinois charging document made clear that petitioner had been charged with knowingly failing to report for incarceration on various dates. Pet. App. 22a.

The trial court held a sentencing hearing at which petitioner challenged the categorization of his failure-to-report escape conviction as a "violent felony" within the meaning of the ACCA. The district court, citing Seventh Circuit precedent, stated that "for reasons of simplicity ... escape is escape. And we're not going to get into the nuances of it for purposes of the sentencing statute." Pet. App. 27a. Following Seventh Circuit authority, the district court refused to treat a failure-to-report escape as different from a custodial escape, and thus concluded that petitioner was an armed "career offender under the statute." *Id.*

The conclusion that petitioner was an armed career offender under § 924(e) substantially enhanced his sentence, raising

his statutory minimum from 0 to 15 years, and his maximum from 10 years to life. Treating him as an armed career criminal, the district court also applied Section 4A1.4 of the Sentencing Guidelines, which incorporates the ACCA, resulting in a Guidelines range of 188 to 235 months. The district court sentenced petitioner to the low end of that range, 188 months, which is slightly above the statutory mandatory minimum of 15 years under the ACCA. Had he not been treated as an armed career criminal, petitioner's guidelines range would have been 130 to 162 months. Pet. App. 1a-2a. But he would not have been sentenced to more than 120 months because that would have been the statutory maximum for his offense.

2. Petitioner appealed his sentence, and the Seventh Circuit affirmed. Judge Posner's opinion for the court begins by noting that it "might [be] doubted" that a failure-to-report escape is typically or often a crime that poses a serious risk of physical harm to others. Pet. App. 2a. The opinion also explicitly acknowledges a split of authority regarding the treatment of failure-to-report escapes as a violent crime under the ACCA. *Id.* at 2a-3a. And the opinion further recognizes the propriety and ease of distinguishing a failure-to-report escape from "jail or prison breaks" for the purpose of determining whether the escape at issue is a violent crime under the ACCA. *Id.* at 3a.

Nonetheless, the panel chose to adhere to its own court's precedent and held that petitioner's failure-to-report escape was properly considered a violent felony under the ACCA. Pet. App. 3a-4a. Nonetheless, the opinion notes that the rule treating failure-to-report escapes like prison breaks "is an embarrassment to the law" because it is based on "a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses." *Id.* at 4a. The decision further criticizes the reasoning of the "head of the line of cases that lump all escapes together, *United States* v. *Gosling*, 39 F.3d 1140,

1142 (10th Cir. 1994)"—that every escape carries the potential for violence because of the "supercharged emotions" that may cause an escapee to "feel threatened by police officers, ordinary citizens, or even fellow escapees." Pet. App. 4a. According to the court, this rationale amounted to "ruminations [that] should not be treated as authoritative" for failure-to-report escapes. *Id.* at 5a. The Seventh Circuit casts further doubt on the majority view by noting that "if the courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of [failure-to-reports (according to a recent study, nearly 90%)] could well compel a conclusion that escape is never a crime of violence." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's opinion acknowledges two critical facts about the treatment of failure-to-report escapes: (1) there is a well developed split of authority regarding whether a failure-to-report escape should be deemed a "violent felony," and (2) the rationale for treating a failure-to-report escape as a "violent felony" is weak. These facts alone would warrant this Court's review. But review in this case has been made even more compelling by this Court's decision in *James*, which exposed the urgent need for this Court to address the proper standard for determining whether a crime, such as a failure-to-report escape, that is not analogous to those violent crimes specifically enumerated in the ACCA should be treated as a "violent felony" for purposes of the ACCA.

1. Ten courts, including the Seventh Circuit below, have stated that all escapes should be treated as a violent crime. Pet. App. 3a-4a (decision below); *Winn*, 364 F.3d at 12 (failure to return to halfway house); *Rivera*, 127 F. App'x at 545 (failure-to-report escape is a violent crime under ACCA) (citing *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002) (prisoner walking off from work program)); *Luster*, 305 F.3d at 202 (treating a conviction as a crime of violence even when

"the statute clearly extends to a 'walk away' from custody not involving any contemporary violence"); *Mathias*, 2007 WL 1097952, at *3-5 (walkaway from a work release program); *Ruiz*, 180 F.3d at 676-77 (walkaway from prison camp without barriers and armed guards); *Anglin*, 169 F. App'x at 975 (reasoning that any conviction under the federal escape statute, 18 U.S.C. § 751, is a crime of violence even though the statute extends to conduct as simple as reporting late to serve a sentence) (citing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999)); *Nation*, 243 F.3d at 472 (stating that "every escape, even a so-called 'walkaway' escape" is a crime of violence); *Turner*, 285 F.3d at 915-16 (failure to return to halfway house); *Gay*, 251 F.3d at 952-55 (walkaway from non-secure diversion center).[2] As the decision below notes, the rationale for this view that has been repeatedly cited and followed by various circuits was articulated by the Tenth Circuit in *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). *Gosling* was actually not a failure-to-report case, but involved "'willfully, unlawfully, and feloniously escap[ing] from ... [a] County Jail.'" *Id.* at 1142 (alterations and omission in original). Nonetheless, the *Gosling* court reasoned broadly:

> every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so. A defendant who escapes from a jail is likely to possess a variety of

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[2] Several of the cases involve appeals challenging the treatment of an escape as a "crime of violence" under the Sentencing Guidelines, U.S.S.G. § 4B1.2. The definition of "crime of violence" provided in that guideline provision is nearly identical to the definition of "violent felony" in the ACCA. *Compare* U.S.S.G. § 4B1.2, *with* 18 U.S.C. § 924(e)(2)(B). For that reason, lower courts have treated cases interpreting this guideline provision as no different from cases interpreting the ACCA, and vice-versa. *See Winn*, 364 F.3d at 9 n.1 (noting uniform view of courts that interpretation and application of Guidelines provision can be applied to ACCA).

> supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

Id. (internal citation omitted). The Tenth Circuit's reasoning was a material (and unnecessary) extension of the case upon which it relied, *United States* v. *Aragon*, 983 F.2d 1306 (4th Cir. 1993). In *Aragon*, the Fourth Circuit had held that escape from a federal prison was a crime of violence because of the circumstances of the prison custodial setting. *Id.* at 1313. That limited rationale would have been sufficient to support treating Gosling's escape from jail as a crime of violence. But the Tenth Circuit went further, looking beyond the circumstances of the case to the potential circumstances of the escapee's later apprehension.

Gosling's speculation regarding the potential for violence during recapture has proved the essential justification for treating failure-to-report escapes as violent crimes just like jail or prison breaks. *Winn*, 364 F.3d at 12 (treating failure to return to halfway house as violent crime because "there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody"); *Luster*, 305 F.3d at 202 (emphasizing that "the escapee must continue to evade police and avoid capture"); *Mathias*, 2007 WL 1097952, at *4 ("Even if the escape itself could somehow sidestep any potential risk of injury, the circumstances of recapture necessarily encompass just such a risk."); *Turner*, 285 F.3d at 916 ("there is no way to predict what an escapee will do when encountered by the authorities"). Indeed, the Seventh Circuit decision which bound the panel below specifically relied on the argument that "the potential for a violent confrontation arises between the defendant and law

enforcement during the attempted capture," even when the escape crime was a mere failure to report to a correctional facility or a halfway house. *United States* v. *Golden*, 466 F.3d 612, 614 (7th Cir. 2006), *petition for cert. filed*, No. 06-10751 (U.S. Apr. 9, 2007).

Two courts have openly rejected the rationale behind the majority view. The Ninth Circuit has specifically held that a failure-to-return escape is not a crime of violence. *Piccolo*, 441 F.3d at 1088-90. The Ninth Circuit noted that failure-to-report or walkaway escapes, do not involve the same risk of confrontation as an escape from secure confinement or physical custody. *Id.* at 1088. *Piccolo* squarely rejected *Gosling*, and its progeny, precisely because the danger to others posed by an escape from "a secured facility or the custody of an armed guard" is not present when the escapee leaves a halfway house with permission and fails to return. *Id.* at 1089.

The D.C. Circuit has specifically discussed the recapture rationale, and rejected it. *Thomas*, 333 F.3d at 282-83. After noting that numerous courts have followed the reasoning of *Gosling*, *Thomas* observed:

> While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of any lawbreaker. Thus, one might argue that under the approach of those circuits, all crimes become crimes of violence ....

Id. at 282. Though the *Thomas* court rejected the rationale of *Gosling*, it nonetheless concluded that the escape before it was a crime of violence because Thomas's crime was "escape from an officer," which creates a more apparent risk of violence. *Id.* at 283. Anticipating the analysis in *Piccolo*, the D.C. Circuit observed: "A prisoner not returning to a halfway house or sneaking away from an unguarded position in the night may not inherently create a risk of harm to others. A

prisoner escaping from the custody of an officer does create such an inherent risk." *Id.*

In the decision below, Judge Posner was bound by circuit precedent, but made clear his belief that there is substantial merit to the analyses of the Ninth and D.C. Circuits. He specifically recognized that this Court's decisions make it perfectly appropriate to distinguishing between an escape from physical custody on the one hand and a failure-to-report or walkaway escape on the other. "The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *United States* v. *Shepard*, 544 U.S. 13 (2005), to decide which bin a conviction for escape belonged in." Pet. App. 3a.[3] He also pointed to the absurdity of the majority rule: showing up an hour late to prison could result in a 15-year mandatory sentence under the ACCA. *Id.* at 2a.

Judge Posner's reservations about the result in this case were not sufficient, however, to overcome the force of circuit precedent. The same will remain true in the numerous other circuits where the decision has already been made, based on highly questionable reasoning, to treat all escapes as violent crimes. And the issue is likely to continue to arise with some frequency. As the substantial body of decisions in the lower courts demonstrates, a prior conviction for escape is commonly relied upon as a predicate violent crime to support an armed career offender sentence. Numerous statutes, including the Illinois statute at issue here, 720 ILCS 5/31-6(a), and the federal escape statute, have been interpreted or expressly define escape to include not only escape from the physical custody of a state official or secure facility, but also

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[3] This Court held in *Sheperd* that a subsequent court trying to determine whether a prior conviction should be treated as a violent felony under the ACCA may consider "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." 544 U.S. at 16; *see also Taylor* v. *United States*, 495 U.S. 575, 600-02 (1990).

failures to report and walkaways from non-secure facilities. See, *e.g.*, *Anglin*, 169 F. App'x at 974-75 (discussing the breadth of the federal escape statute, 18 U.S.C. § 751); 18 Pa. Cons. Stat. Ann. § 5121(a) (defining escape to include "fail[ure] to return to official detention following temporary leave granted for a specific purpose or limited period"); N.J. Stat. Ann. 2C:29-5(a) (same); Ariz. Stat § 13-2501 (same); Cal. Penal Code § 4530 (subsection (c) defines escape to include the "willful failure ... to return" of those on temporary release); Ga. Code Ann. § 16-10-52 (subsection (a)(5) includes failure to return). Only this Court's intervention can resolve the split of authority and provide uniform treatment of this frequently invoked provision that produces such harsh sentences.

2. The need for this Court's review of this issue has been made even more urgent by this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007). In *James*, this Court held that attempted burglary, as defined by Florida law, is a violent felony for purposes of the ACCA's residual clause. *Id.* at 1590-91. The reasoning of the decision was, however, limited. This Court did not offer a generally applicable method for determining whether unenumerated crimes qualify as violent felonies under the ACCA's residual clause. The majority opinion did not purport to decide whether attempted burglary, if it were defined differently than it has been defined in Florida, would qualify as a violent felony under the residual clause. *Id.* at 1595-96. Instead, it simply determined that attempted burglary as defined by Florida law "poses the same kind of risk" as completed burglary (which is an enumerated violent felony under the ACCA), and hence is properly considered a violent felony under the residual clause. *Id.* at 1595.

The *James* majority concedes that it did not provide any guidance for lower courts with respect to whether a crime that is not analogous to one of the enumerated crimes in the ACCA is a violent felony. The majority acknowledged that

"provid[ing] guidance for the lower courts in future cases [is] surely a worthy objective." *Id.* at 1598. But *James* itself was not a proper case to do so because the case did not present such a crime, and certain issues relevant to the inquiry had not been briefed. *Id.*

Justice Scalia's dissenting opinion elaborated on why it is so important to provide a generally applicable, uniform standard that lower courts can use to decide whether an offense is a "violent felony" within the meaning of the ACCA: without such guidance, the court system is left without any way to provide "an acceptable degree of consistency by the hundreds of district judges that impose sentences every day." *Id.* at 1601 (Scalia, J., dissenting). The *James* dissent noted that there are numerous crimes that are not analogous to any of the enumerated offenses (burglary, arson, extortion, and crimes involving the use of explosives, 18 U.S.C. § 924(e)(2)(B)(ii)). Justice Scalia himself provided various examples: driving under the influence of alcohol, 127 S. Ct. at 1601-02 (Scalia, J., dissenting) (citing *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (driving under the influence of alcohol does not pose a "substantial risk that physical force against the person or property of another may be used" under 18 U.S.C. § 16(b)), and operating a dump truck without the consent of the owner, *id.* at 1606 n.4 (Scalia, J., dissenting) (citing *United States* v. *Johnson*, 417 F.3d 990 (8th Cir. 2005)). The list could readily be multiplied: felon in possession of a firearm, *United States* v. *Doe*, 960 F.2d 221, 222 (1st Cir. 1992) (Breyer, C.J.) (holding that possession of firearms is not violent but noting split of authority), unlawful transportation of hazardous chemicals, which then-Chief Judge Breyer hypothesized in *Doe*, *id.* at 225, attempting to elude a police vehicle, *United States* v. *Kelly*, 422 F.3d 889, 893 (9th Cir. 2005) (holding this offense was not a crime of violence), and resisting arrest, *United States* v. *Wardrick*, 350 F.3d 446, 455 (4th Cir. 2003) (holding that resisting arrest is a crime of violence). The controlling opinion in *James* says nothing at all about how

lower courts are supposed to determine whether any crime which is not analogous to one of the enumerated crimes in the ACCA is a violent felony.

This case presents an ideal vehicle for resolving this unanswered question, and providing lower courts a generally applicable standard for determining whether crimes that are not analogous to the enumerated crimes in the ACCA fall within the ACCA's residual provision for violent felonies. *Both* the majority and the dissent in *James* acknowledged that the crime of escape is not analogous to any of the enumerated offenses. *James*, 127 S. Ct. at 1598; *id.* at 1606 n.4 (Scalia, J., dissenting). And *both* the majority and the dissent in *James* recognize that providing a generally applicable standard for such crimes is a "worthy objective." *Id.* at 1598; *id.* at 1602 (Scalia, J., dissenting) ("Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the ACCA's residual provision, yet its boundaries are ill defined."). Indeed, the urgency of providing some generally applicable guidance is heightened by the concern that the statute is otherwise impermissibly vague. *Id.* at 1609 (Scalia, J., dissenting) (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)).

3. Accepting review of this case will also provide this Court with an opportunity to place a principled limit on the scope of the residual clause. The *Gosling* rationale for treating failure-to-report escapes as violent crimes is essentially without limit, as the D.C. Circuit in *Thomas* correctly recognized. If the fear of recapture is sufficient to give rise to a "serious potential risk of injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), then it is hard to see what crime is not a violent felony under the ACCA. All crimes carry a risk of detection and, even if no detection occurs in the commission of the crime, there always remains the risk of subsequent capture. *Thomas*, 333 F.3d at 282. There is no reason to believe that individuals who fail to report for custody are

especially likely to engage in violence if confronted by an officer seeking to capture them. *Golden*, 466 F.3d at 615 (Rovner, J., concurring) (arguing that, unlike escape from custody, the "mere failure to report to custody in the first instance does not reflect" a specific inclination to resist or evade restraint).

Needless to say, any reading of the residual provision that expands it to encompass all or nearly all crimes is problematic. The text of the statute cannot be squared with the view that Congress intended to impose its substantial penalty (a 15-year mandatory minimum) for just any armed repeat offender. The statute singles out certain of the most dangerous and socially destructive armed repeat offenders: those with a history of violent felonious conduct and repeat drug offenders. 18 U.S.C. § 924(e); H.R. Rep. No. 98-1073, at 1-3 (1984) (discussing purpose of the enhanced penalty, which was to incapacitate the kinds of repeat violent offenders that studies had shown were responsible for a high volume of violent crime). "If Congress wanted ... [to] subject[] *all* repeat offenders to a 15-year mandatory prison term[,] it could very easily have crafted a statute which said that. ACCA ... was obviously not meant to have such an effect." *James*, 127 S. Ct. at 1609 (Scalia, J., dissenting); *Doe*, 960 F.2d at 225 (refusing to treat a conviction for being a felon in possession of a firearm as a violent crime because to do so would "bring within the statute's scope a host of other crimes that do not seem to belong there").

Further, the broad reading of the residual provision that is necessary to conclude that failure-to-report escapes are violent crimes is inconsistent with the language of the ACCA. As then-Chief Judge Breyer observed, "The statute gives several specific examples—burglary, arson, extortion, use of explosives—and then adds, 'or otherwise involves *conduct* that presents a serious potential risk of physical injury to another.'" *Id.* at 224. When the act of committing the crime at issue does not involve the serious potential for "active

violence," *id.* at 225, then the text of the statute points away from its inclusion as a "violent felony." See *Leocal* v. *Ashcroft*, 543 U.S. 1, 10-11 (2004) (defining "crime of violence" under 18 U.S.C. § 16(b) to mean "violent, active crimes").

This Court in *James* suggested that some limits to the residual clause are still waiting to be articulated. The Court concluded that Florida's version of attempted burglary, which required proof of an overt act to enter a structure, *James*, 127 S. Ct. at 1594, carried a sufficient potential risk of violence to satisfy the residual clause. But, this Court noted, other jurisdictions allowed convictions for attempted burglary based on conduct that poses a lesser risk of confrontation with others. *Id.* at 1596 n.4 (collecting cases where burglary was defined to include merely "making a duplicate key" or "casing [a] building" or neighborhood). While this Court withheld any judgment as to those statutes, it noted that the risk of violence presented by such crimes was "more attenuated." *Id.* at 1596.

This case presents a crime with a substantially "attenuated" risk of violent confrontation. A failure-to-report escape does not involve any active violence. Quite the contrary, a failure-to-report escape involves no *action* at all; it is a crime of *inaction*. There is no risk of violence in the commission of such a crime precisely because there is no risk of confrontation in the commission of the crime. The individual who fails to report is choosing *not* to come into contact with others, or expose himself to coming into contact with law enforcement officials. The only risk of violence that has even been considered by the lower courts is not in the commission of a failure-to-report escape (as opposed to an escape from the physical custody of an officer or a secure facility), but rather in the potential for subsequent apprehension. This Court should specifically rule that the risk of violence in subsequent apprehension may not, standing alone, provide the requisite

"serious potential risk" of harm to others for purposes of the residual clause. 18 U.S.C. § 924(e).

Petitioner acknowledges, as the Seventh Circuit emphasized below, that there is a dearth of statistical evidence concerning how frequently failure-to-report or walkaway escapes result in violence. Pet. App. 5a-6a. But this should not deter this Court from engaging this question now. Courts are today being forced to apply this statute to crimes that are not analogous to the enumerated violent felonies in the ACCA. Decisions are, therefore, being made routinely on less than perfect information. See *James*, 127 S. Ct. at 1608 (Scalia, J., dissenting) (noting that deciding whether to treat a crime as falling within the residual provision without hard statistics "is an imponderable that cannot be avoided"). And there is no way of knowing when the hoped-for data will emerge, not only for failure-to-report escapes, but also for the myriad other crimes that arguably fall within the residual provision but are not analogous to any enumerated crime.

Also, it remains for this Court to decide which way the lack of data cuts. It makes little sense to place upon the defendant the burden of presenting data that a crime only infrequently, if at all, involves harm to others, when it is the prosecution that is seeking to enhance the defendant's sentence based on its argument that the crime is a "violent felony" within the meaning of the ACCA. Indeed, as Justice Thomas has observed, and again pointed out in his dissent in *James*, 127 S. Ct. at 1610 (Thomas, J., dissenting), allowing a judge to resolve the contested question whether a particular prior conviction was, in fact, for a "violent felony" raises serious constitutional concerns under the Sixth Amendment. *Shepard*, 544 U.S. at 27 (Thomas, J., concurring). Those concerns are heightened when a court is asked to review potentially contested data and make a finding of fact regarding the allegedly "violent" nature of a particular crime. If such statistical evidence is necessary at all, the prosecution should be required to produce it because the government

carries the burden of establishing that the defendant has three prior convictions qualifying under the ACCA.

* * * *

In the end, this case presents this Court with an excellent vehicle to resolve a split of authority concerning a frequently recurring issue in federal criminal law. More broadly, this case provides this Court with an opportunity to provide generally applicable standards for how lower courts should determine whether a crime that is not analogous to enumerated crimes in the ACCA falls within the residual clause. This Court has already indicated in *James* that articulating such a standard is desirable. This is especially so in light of the fact that, absent this Court's guidance, the lower courts are articulating expansive rationales that cause the residual clause to encompass crimes far beyond the ACCA's text and purpose. This Court's review is urgently needed.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

Robert N Hochman /pc

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May 8, 2007

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CERTIFICATE OF SERVICE

No. 06-

Deondery Chambers,

Petitioner,

v.

United States of America,

Respondent.

I, Jeffrey T. Green, do hereby certify that, on this eighth day of May, 2007, I caused one copy each of the Motion For Leave To File In Forma Pauperis and the Petition For A Writ Of Certiorari in the foregoing case to be served by an overnight delivery service on the following party:

PAUL D. CLEMENT
SOLICITOR GENERAL
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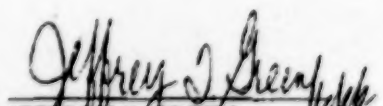

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 06-2405

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEONDERY CHAMBERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 4:05-cr-40044-JLF—G. Patrick Murphy, *Chief Judge.*

ARGUED DECEMBER 13, 2006—DECIDED JANUARY 9, 2007

Before POSNER, MANION, and EVANS, *Circuit Judges.*

POSNER, *Circuit Judge.* The defendant pleaded guilty to being a felon in possession of a firearm. The judge, finding that the defendant had committed three crimes of violence previously, sentenced him to 188 months as an armed career criminal. 18 U.S.C. § 924(e). The only question presented by the appeal is whether one of those convictions, a conviction under Illinois law for escape, was indeed a crime of violence. The answer depends on whether escape "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(1). A jail break does; but Illinois defines felonious

escape not only as "intentionally escap[ing] from a penal institution or from the custody of an employee of that institution" but also as "knowingly fail[ing] to report to a penal institution or to report for periodic imprisonment at any time." 720 ILCS 5/31-6(a). The defendant's escape was in the latter category—failing to report to a penal institution. The charging document is not in the record, but as summarized in the presentence investigation report and not challenged by the defendant it states that on four occasions he failed to report on schedule to a penal institution after being convicted for drug possession, robbery, and aggravated battery.

As an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often "involves conduct that presents a serious potential risk of physical injury to another." *United States v. Golden*, 466 F.3d 612, 616-17 (7th Cir. 2006) (Williams, J., dissenting). You could show up an hour late (without an excuse) and be guilty of a felony that could result in your receiving a 15-year mandatory minimum sentence under the Armed Career Criminal Act. Had the defendant been sentenced without the enhancement, his guidelines sentencing range would have been 130 to 162 months. See U.S.S.G. §§ 2K2.1(a)(2), (b)(5), 3C1.2, E1.1(a), (b).

But the majority opinion in *Golden*, tracking our earlier opinion in *United States v. Bryant*, 310 F.3d 550 (7th Cir. 2002), refused to carve the Illinois escape statute at the joint, as it were, but held instead that *any* violation of the statute is a crime of violence for purposes of the Act. The other courts of appeals, except the D.C. and Ninth Circuits, are in accord. *United States v. Winn*, 364 F.3d 7 (1st Cir. 2004); *United States v. Luster*, 305 F.3d 199, 202 (3d Cir.

2002); *United States v. Jackson*, 301 F.3d 59, 63 (2d Cir. 2002); *United States v. Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States v. Gay*, 251 F.3d 950 (11th Cir. 2001) (per curiam); *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States v. Ruiz*, 180 F.3d 675 (5th Cir. 1999); *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999); *United States v. Mitchell*, 113 F.3d 1258, 1533 (10th Cir. 1997). The D.C. Circuit reserved the issue in *United States v. Thomas*, 333 F.3d 280, 282-83 (D.C. Cir. 2003). See also *United States v. Adkins*, 196 F.3d 1112, 1119 (10th Cir. 1999) (McKay, J., concurring), and Judge Rovner's concurring opinion in our *Golden* case. The Ninth Circuit ruled that a peaceful failure to return, followed by the defendant's turning himself in rather than being recaptured, is not a crime of violence. *United States v. Piccolo*, 441 F.3d 1084 (9th Cir. 2006).

All these cases involved either a failure to return to a halfway house—a type of failing to return that seems even less violence-prone than failing to show up at prison, because a violent prisoner would be less likely to be serving a part of his sentence in a halfway house—or a "walkaway" escape, which does not involve breaking out of a building or wrestling free of guards. There would be no impropriety in dividing escapes, for purposes of "crime of violence" classification, into jail or prison breaks on the one hand and walkaways, failures to report, and failures to return, on the other. The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *Shepard v. United States*, 544 U.S. 13 (2005), to decide which bin a conviction for escape belonged in.

But we shrink from trying to overrule a decision that is only a few months old (*Golden* was decided on October 25,

2006), that tracked an earlier and materially identical decision of this court (*Bryant*), and that has overwhelming support in the decisions of the other circuits. The defendant has not presented us with arguments or evidence that were overlooked or unavailable in the previous cases. He cites us to *United States v. Hagenow*, 423 F.3d 638, 644-45 (7th Cir. 2005), which held that because the offense of "confinement" in Indiana can be committed without endangering the person confined, the sentencing judge has to look behind the label of the defendant's conviction to see whether his conduct endangered anyone. But the defendant in this case is not asking for a deeper investigation into the circumstances of his failure to report. He is asking us to carve out noncustodial from custodial escape, and that is the move rejected in *Bryant* and *Golden*, as well as in the cases we cited from other circuits.

We shall adhere to the precedents for now. But it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses. The head of the line of cases that lump all escapes together, *United States v. Goslin*, 39 F.3d 1140, 1142 (10th Cir. 1994), states in colorful language quoted in many of the subsequent cases that "every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so . . . . A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees . . . .

[E]ven in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious risk that injury will result when officers find the defendant and attempt to place him in custody." (Emphasis in original.) This is conjecture floating well free of any facts—even the facts of *Goslin*. The opinion says nothing about the nature of Goslin's escape, but the reference to escaping from a jail suggests that the court wasn't thinking about walkaway escapes, or failures to return or report, but about jail breaks (most jail breaks are stealthy). Its ruminations should not be treated as authoritative in a case that does not involve a jail break.

The Sentencing Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report or return. Should it turn out that the latter frequency is very low, this would provide a powerful reason to reexamine *Bryant* and *Golden*. Alternatively, Congress, which has investigative tools, might examine the issue with a view toward a possible clarification of 18 U.S.C. § 924(e)(1).

The most helpful analysis of escapes from United States prisons that we have found, Richard F. Culp, "Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data," 85 *Prison J.* 270 (2005), unfortunately excludes from its study "walkaways from minimum-security facilities, failures to return from approved absences, and escapes from custody staff while being transported outside," *id.* at 275, although almost 90 percent of all escapes are walkaways. *Id.* at 278; Camille Graham Camp & George M. Camp, "The Corrections Yearbook 1997" 18 (Criminal Justice Institute, Inc., 1997).

And while the Culp study includes recaptures after an escape, it does not reveal whether a recapture involved violence. *Id.* at 281-82. More than 6 percent of the escapees committed crimes while on the lam, and many of these were violent crimes, *id.* at 285-86, but that is not evidence that escape itself is likely to be violent; for all that appears, the escapees were merely resuming their previous criminal careers. Six percent of the escapes in the study involved violence against prison staff, *id.* at 285—violence on the way out, as it were—but there is no indication of how many of the recaptures (some 75 percent of escaped prisoners are recaptured, *id.* at 282) involved violence. The study notes that records of prison escapes are not standardized and that recapture data are even less reliable than escape data. *Id.* at 271, 277, 281.

It is apparent that more research will be needed to establish whether failures to report or return have properly been categorized by this and most other courts as crimes of violence. Notice too that if courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of walkaways could well compel a conclusion that escape is never a crime of violence. Some disaggregation seems indicated, but to do it sensibly we judges need data.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

FILED
MAY 16 2006
G. PATRICK MURPHY
DISTRICT JUDGE
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS, ILLINOIS

UNITED STATES DISTRICT COURT
Southern District of Illinois

UNITED STATES OF AMERICA
V.

DEONDERY LAZAR CHAMBERS, II
a/k/a Deondery L. Chambers

JUDGMENT IN A CRIMINAL CASE

Case Number: 05-40044-001-JLF

USM Number: 06730-025

Phillip J. Kavanaugh, Federal Public Defender
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 922(g)(1), 924(a)(2), 924(c)	Felon in Possession of a Firearm	May 31, 2005	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 12, 2006
Date of Imposition of Judgment

G. Patrick
Signature of Judge

G. Patrick Murphy, Chief Judge
Name and Title of Judge

05/16/06
Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: DEONDERY LAZAR CHAMBERS II
CASE NUMBER: 05-40044-001-JLF

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

188 months

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 -- Supervised Release

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court, not to exceed 52 tests in a one year period.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release. The defendant shall pay the fine in installments of $20.00 per month or 10% of his net monthly income, whichever is greater.

The defendant shall provide the probation officer and the Financial Litigation Unit of the United States Attorneys' Office with access to any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation. The defendant shall immediately notify the probation officer of the receipt of any indicated monies.

The defendant shall participate as directed and approved by the probation officer in treatment for narcotic addiction, drug dependence, which includes urinalysis or other drug detection measures and which may require residence and/or participation in a residential treatment facility. Any participation will require complete abstinence from all alcoholic beverages. The defendant shall pay for the costs associated with substance abuse counseling and/or testing based on a co-pay sliding fee scale approved by the United States Probation Office. Co-pay shall never exceed the total costs of counseling.

The defendant shall submit his person, residence, real property, place of business, computer, or vehicle to a search, conducted by the United States Probation Officers at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 5 of 6

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 750.00	$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0	$ 0

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6 - Schedule of Payments

Judgment — Page 6 of 6

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

F. ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments are due immediately, through the Clerk of the Court, but may be paid from prison earnings in compliance with the Inmate Financial Responsibility Program. Any financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of $20.00 per month, or 10% of defendant's monthly net earnings, whichever is greater.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 16, 2007

Before

Hon. Richard A. Posner, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 06-2405

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEONDERY CHAMBERS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 4:05-cr-40044-JLF

G. Patrick Murphy, *Chief Judge.*

ORDER

On January 22, 2007, defendant-appellant filed a petition for rehearing with suggestion for rehearing *en banc*, and on February 12, 2007, plaintiff-appellee filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL NO. 05-40044-JLF
	)	
vs.	)	
	)	Title 18, United States Code,
DEONDERY LAZAR CHAMBERS, II,	)	Sections 922 and 924
a/k/a Deondery L. Chambers,	)	
	)	
Defendant.	)	

FILED
JUL 06 2005
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON OFFICE

INDICTMENT

THE GRAND JURY CHARGES:

On or about May 31, 2005, in Jefferson County, within the Southern District of Illinois,

DEONDERY LAZAR CHAMBERS, II,
a/k/a Deondery L. Chambers,

defendant herein, who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, a felony under the laws of the State of Illinois, on or about July 15, 1998, to wit: Robbery and Aggravated Battery, in the Circuit Court for the Second Judicial Circuit, Jefferson County, Illinois, Case No. 98-CF-109, did knowingly possess in and affecting interstate commerce a firearm, that is: a Smith and Wesson, Model 66, .357 Magnum caliber revolver, serial number 9K6476, all in violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 924(e).

A TRUE BILL:

John Daniel
FOREPERSON

Randy G. Massa
/s/ RONALD J. TENPAS
United States Attorney

GEORGE A. NORWOOD
Assistant United States Attorney

Recommended Bond: Detention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 05-40044-JLF
	)	
DEONDERY LAZAR CHAMBERS, II, a/k/a Deondery L. Chambers	)	
	)	
	)	
Defendant.	)	

INFORMATION CHARGING PRIOR OFFENSES

Comes now the United States of America, by and through its attorneys, Ronald J. Tenpas, United States Attorney for the Southern District of Illinois, and George A. Norwood, Assistant United States Attorney, pursuant to Section 924(e)(1) of Title 18, United States Code, and informs the Court that the government believes that the defendant qualifies as an armed career criminal within the meaning of Section 924(e)(1), stating as follows:

1. That the defendant has been charged in the indictment with a violation of Title 18, United States Code, Section 922(g)(1).

2. That on July 15, 1998, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Robbery and Aggravated Battery in Case No. 98-CF-109.

3. That on February 24, 1999, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Escape in Case No. 99-CF-47.

4. That on June 30, 1999, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Unlawful Delivery of a Controlled Substance within 1000 feet of Public Housing in Case No. 99-CF-157.

WHEREFORE, the United States of America hereby files this Information Charging Prior Offenses to subject the defendant to the enhanced provisions of Title 18, United States Code, Section 924(e)(1) upon his conviction under the Indictment.

s/ George A. Norwood
GEORGE A. NORWOOD
402 West Main Street, Suite 2A
Benton, IL 62812
Phone: (618) 439-3808 Ext. 111
Fax: (618) 439-2401
E-mail: George.Norwood@usdoj.gov

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. 05-CR-40044
)
DEONDERY LAZAR CHAMBERS,)
)
Defendant.)

REPORT OF PROCEEDINGS

Sentencing Hearing

BE IT REMEMBERED AND CERTIFIED that heretofore on May 12, 2006, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, Honorable G. Patrick Murphy presiding, the following proceedings were had in open court in Benton, Illinois, to-wit:

APPEARANCES

Mr. George Norwood
Asst. U.S. Attorney — For the Plaintiff

Mr. Phillip J. Kavanaugh
Federal Public Defender — For the Defendant

JANE McCORKLE
Official Court Reporter
U.S. District Court
301 W. Main Street
Benton, Illinois 62812

THE CLERK: Court calls United States of America versus Deondery Lazar Chambers, case number 05-40044. Are the parties ready?

MR. NORWOOD: The government is present by George Norwood, Assistant U.S. Attorney. We are ready to proceed.

MR. KAVANAUGH: The defendant, Deondery Chambers, is present with his counsel, Phil Kavanaugh. We are ready to proceed.

THE COURT: Let the record show that counsel are present. Mr. Chambers is here with Mr. Kavanaugh, and Mr. Norwood is here, also.

Now the matter is set for sentencing this morning. And in the ordinary course of business, the Probation Department prepared the usual detailed written Presentence Investigation Report. There were objections filed. There was an addendum to the Presentence Investigation Report. I think that's been provided to both sides.

Now, we will get to the objections that are going to require a factual, some factual findings, but as I understand the case, here is where we are. First of all, if the defendant qualifies as a career offender with his Criminal History Category of VI and giving him the three points for cooperation that he would be entitled to, he comes out as a 31. And that seems to the Court, and I stand here to be corrected, but if that's the case, then the other

objections really don't amount to anything because in that event, I think he has a base offense level of 24.

The Probation Department and the government have him for an additional four points on top of that because of the aggravated use of a firearm and then another two points on top of that for reckless endangerment, which would bring him up to a 30. And then he would get his three points off, which would bring him down to a 27.

So it seems to the Court that the most important matter would be to determine, first, whether he is a career offender. Mr. Norwood, have I stated this correctly?

MR. NORWOOD: The government believes so. If he is an armed career criminal, there will be a minimum sentence of 15 years and a maximum sentence of life. If there is not there will be a maximum sentence of 10 years under the felon in possession statute. So I think you're correct with respect that would be dispositive of the legal argument. It would be dispositive of most of the issues. I'm not sure. I believe the defendant will appeal.

THE COURT: Well, I'm still going to make the conditional finding. There's no question about that. I'm not going to leave anything undone.

MR. NORWOOD: Okay.

THE COURT: But that would be the first issue for the Court.

MR. NORWOOD: Then I agree with the Court, Judge.

THE COURT: Mr. Kavanaugh.

MR. KAVANAUGH: There is a slight distinction. In that if the Court finds the defendant used or possessed the firearm in connection with a crime of violence, then the armed career criminal base offense level would be 34 minus three for acceptance. If the Court finds that he didn't possess the firearm in connection with a crime of violence, then it would be 33. It's an eight-month difference, Your Honor. If he's a 34 minus three, it's 188 as the low. If he's a 33 then it would be 180 as the low part, 180 to 210. Other than that the Court's correct in its observations.

THE COURT: All right. We will discuss that as need be, but the first question for the Court is you have the predicate offense for the career offender statute. Now your objection is a simple legal argument that the escape for which he was convicted does not qualify as a violent crime.

MR. KAVANAUGH: That's correct, Your Honor.

THE COURT: And while one might think that to be the case, if my memory doesn't fail me, we have the Bryant case by Judge Kanne who says that it is, and I believe there's at least one other case in the Seventh Circuit. Is that your understanding of the law?

MR. KAVANAUGH: That was the law until we've had Shepard and Hagenow. I believe that those two cases somewhat

alter --

THE COURT: Is that the Ninth Circuit case?

MR. KAVANAUGH: No, Hagenow is a Seventh Circuit case and Shepard, obviously, is a Supreme Court case.

THE COURT: Tell me about the Seventh Circuit case that you think changes it.

MR. KAVANAUGH: Well, Hagenow was decided on August the 31st of 2005. It stands for the proposition that when you have a generic crime like burglary or escape or something like that, the issue of whether or not the conduct, the offense conduct involves a potential risk of physical injury to another or has as an element the use or attempted use of threatened physical force, the sentencing court is to look at the actual charging instrument itself to see what kind of generic conduct was charged in the state court.

In this case Mr. Chambers was convicted of escape, but the actual indictment charges him with failure to report for a periodic imprisonment. In other words, he was sentenced to weekends in jail, and he didn't show up for three of them. On the face of the charging document itself, it's pretty clear that there is no violence, no attempted violence, no suggestion of violence. He just didn't come to report to jail for three weekends.

Ultimately, in that case he was charged with escape. He pled guilty to it. Was continued on probation

and they just gave him four additional weekends to serve subsequent to the plea on the escape charge. There was no indication in that at all that there was any violence involved.

There's another case that we've cited in the sentencing memorandum, and that's another Seventh Circuit case which was decided on December the 19th, 2005, United States versus Sperberg, S-P-E-R-B-E-R-G, and that discusses this issue, also. And it says on page 2 of the printout -- I don't have the exact page number, but it says, "When a law specifies multiple ways to commit an offense, one within the scope of a recidivism enhancement and the other not, the federal court may examine the charging papers and plea colloquy to determine which variety of offense the conviction reflects." to see whether or not in this case this type of escape is violent.

It's pretty clear from the record in state court, Your Honor, that all he did was just didn't show up on time for three weekends.

THE COURT: And you have the indictment there?

MR. KAVANAUGH: Yes, sir.

THE COURT: And what does the indictment provide?

MR. KAVANAUGH: It, basically, charges a violation of -- let's see. First, is a violation of 730 ILCS 5/3-6-4, which basically penalizes a person for failure to return from

furlough or work release.

THE COURT: All right.

MR. KAVANAUGH: Here's a copy of the statute.

THE COURT: You will provide that to my clerk.

MR. KAVANAUGH: I do have the indictment. I left it across the street.

THE COURT: For the moment I will take it as stated. I have no reason not to.

All right, Mr. Norwood. It doesn't sound like we have here what the escape cases talk about. The cases talk about because every escape involved a serious potential risk of physical injury to another, and what I have in mind is I'm trying to give a good example. But someone knocking the guard in the head and crawling over the fence at Marion and making a go for it, and it sounds like here the defendant just simply failed to report, which didn't involve any potential risk of physical injury.

MR. NORWOOD: Well, Your Honor, a couple things. First, the Seventh Circuit has rejected that argument years ago in the Bryant case.

THE COURT: That's Judge Kanne's case.

MR. NORWOOD: Yes, Your Honor. Where that very argument was raised by the defendant objecting to the categorical approach of the Seventh Circuit. And all escapes, no matter if they're walk-away or failure to report

or the old hitting on the guard in-the-head escape, they are all crimes of violence.

I mean that's -- I'll read from -- I know the Court's read the Bryant opinion, but I mean Bryant -- here's what the court said. "Bryant asks this Court to redefine our decision in Franklin by holding that not every crime of escape amounts to a crime of violence. He urges this Court to instead follow a fact-specific approach when determining if a particular crime of escape should be categorized as a crime of violence. Specifically, he argues that the type of escape for which he was charged -- failure to return to a halfway house after being absent on a work release -- is more appropriately thought of as failure to return than an escape. According to his reading the 'failure to return' to a halfway house after being absent without permission prevents so much less of a risk of violence that it must be considered different and distinct from a 'bust-out' or 'slither-away' type of escape."

The Seventh Circuit rejected this very argument.

THE COURT: And you say, too, that the more recent cases cited by the defendant simply do not trump Bryant.

MR. NORWOOD: Absolutely not. I could not find a published Seventh Circuit opinion involving escape, but I have found for the Seventh Circuit in the case, and it cites the case of United States versus Lewis, but the Booker

decision did not change this categorical approach to escape. Booker had to do with --

THE COURT: Booker has nothing to do with this.

MR. NORWOOD: Nothing has changed in the Seventh Circuit. Whether the Ninth Circuit in Piccolo considers it is one thing, but the Seventh Circuit has always considered escapes of any kind, walk-aways, failures to report or an escape or they are busting out of a prison all the same because of the risk of violence. And this Court knows what that risk of violence is, in any escape, is when the officers go to apprehend that person, they don't know why that person failed to report or walked away or escaped. They are risking their lives apprehending somebody who may not want to either report to prison or for whatever reason, and the Seventh Circuit has said it's a powder keg.

THE COURT: In short your response is that irrespective of the arguments, the Seventh Circuit still adheres to Bryant.

MR. NORWOOD: Absolutely.

THE COURT: Period.

MR. NORWOOD: Yes.

THE COURT: Now, we have certain other matters, too, and, of course, I will rule on all of these. The next is the objection to the four points.

Now, the Court understands that the defendant is a

clear. I'm relying on the guideline commentary and not the offense of duress. I realize that's not applicable here.

THE COURT: The Court has heard the evidence, covering all the papers including the briefs, and I note the following: First, the Bryant case by Judge Kanne is still the law in the Seventh Circuit. There Judge Kanne explicitly rejected an argument that is, in all respects, the same as the argument made here, the holding of that case being so explicit this Court would not rule inconsistently with that decision unless it were explicitly clear that it had been overruled and it has not.

The reason stated in that opinion, the Seventh Circuit simply, and for reasons of simplicity, categorically holds that escape is escape. And we're not going to get into the nuances of it for purposes of the sentencing statute. It counts. So we have here what is a career offender under the statute.

Now the other matters are going to be ruled on, too, so the record is clear.

Now, with regard to the four points, the Court will overrule the defendant's objection and will adopt the probation officer's recommended findings of fact there, and for this reason set aside for the moment the fact that the defendant was a felon in possession. And I use those words

ORIGINAL

06-11206

No. 06-

Supreme Court, U.S.
FILED
MAY 08 2007
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Deondery Chambers — PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):
7th Circuit - pursuant to 18 U.S.C §3006A
U.S. District Court, Southern Illinois - same

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

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06-1206

No. 06-

Supreme Court, U.S.
FILED
MAY 08 2007
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IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioner

* Counsel of Record

May 8, 2007

QUESTION PRESENTED

Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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IN THE

Supreme Court of the United States

No. 06-

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Deondery Chambers respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on January 9, 2007. It has been officially reported and can be found at *United States* v. *Chambers*, 473 F.3d 724 (7th Cir. 2007). It is reproduced in the Appendix at 1a-7a. The district court held a sentencing hearing on May 12, 2006 at which the judge orally ruled that the defendant's prior conviction for escape under Illinois law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The relevant portion of the transcript is reproduced in the Appendix at 18a-27a.

JURISDICTION

The court of appeals issued its opinion on January 9, 2007. Petitioner timely sought rehearing, which was denied on February 16, 2007. Pet. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. 924(e) provides, in pertinent part, as follows:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection--
>
> * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

This case presents a mature split of authority regarding a recurring issue that members of this Court have recently acknowledged requires this Court's attention. The Armed Career Criminal Act ("ACCA") provides an enhanced 15 year mandatory minimum sentence, and up to life imprisonment, for anyone guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), who had previously been convicted of three serious drug and/or violent felonies. 18 U.S.C. § 924(e). Without the ACCA enhancement, the statutory maximum sentence for a violation of § 922(g)(1) is ten years.

The Courts of Appeals have diverged over whether a prior conviction for escape based on a failure to report to confinement is a "violent felony" within the meaning of the ACCA. Unlike a prison break from secure custody, a failure-to-report escape does not involve breaking free from the physical custody of an officer of the state or a secure detention facility. Failure-to-report escapes occur when a detainee is, for any of a number of reasons, provided the opportunity to move about the community without supervision for a limited period of time, but fails to return or report to his or her facility within the appointed time. It is a crime of omission.

There is a 10 to 2 split of authority on whether all escapes should be treated as violent crimes for purposes of career offender status. The Ninth Circuit has held that a failure-to-report escape is not a violent crime. *United States* v. *Piccolo*, 441 F.3d 1084, 1088-90 (9th Cir. 2006). The D.C. Circuit has also indicated that it would not treat a failure-to-report escape as a violent crime, and recognized that failure-to-report escapes are different from both prison breaks from secures facilities and escapes from the physical custody of an officer. *United States* v. *Thomas*, 333 F.3d 280, 282-83 (D.C. Cir.

2003).[1] In the decision below, Judge Posner acknowledged "[a]s an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often 'involves conduct that presents a serious potential risk of physical injury to another.'" Pet. App. 2a (quoting *United States* v. *Golden*, 466 F.3d 612, 616-17 (7th Cir. 2006) (Williams, J., dissenting)). But the Seventh Circuit panel below was bound by prior Seventh Circuit decisions which had held that all escapes are violent crimes. *Id.* Nine other circuits have so held. *United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States* v. *Rivera*, 127 F. App'x 543, 545 (2d Cir. 2005) (citing *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002)); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002); *United States* v. *Mathias*, No. 06-4109, 2007 WL 1097952, at *3-5 (4th Cir. Apr. 13, 2007); *United States* v. *Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999); *United States* v. *Anglin*, 169 F. App'x 971, 975 (6th Cir. 2006) (citing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999)), *cert. denied*, 127 S. Ct. 1249 (2007); *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States* v. *Gay*, 251 F.3d 950, 952-55 (11th Cir. 2001) (per curiam).

This well developed split of authority warrants this Court's review, especially in light of this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007). The relevant provision of the ACCA defines "violent felony" by reference to a list of specific, enumerated offenses (burglary, arson, extortion or crimes involving the use of explosives). 18 U.S.C. § 924(e)(2)(B)(ii). The ACCA also includes a residual provision, covering any unenumerated felony that "otherwise involves conduct that presents a serious potential risk of

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[1] *Thomas* involved an escape from the physical custody of an officer, not a failure to report. 333 F.3d at 282-83. As a result, the D.C. Circuit did not have an occasion in *Thomas* to apply its view that failure-to-report escapes "may not inherently create a risk of harm to others." *Id.* at 283.

physical injury to another." *Id.* Because *James* involved a crime analogous to an enumerated offense (attempted burglary), the majority opinion declined to provide a standard for determining whether an offense that is not analogous to an enumerated offense is a "violent felony" within the meaning of the ACCA. *James*, 127 S. Ct. at 1598. The dissenting opinion argued that leaving such a substantial gap in the interpretation of a frequently invoked federal criminal statute ill serves courts and counsel. *Id.* at 1601-02 (Scalia, J., dissenting). The majority did not disagree that this Court's guidance is needed. It merely noted that a case involving a crime analogous to an enumerated offense was not an appropriate vehicle for an opinion that provides a standard for determining when a crime that is not analogous to an enumerated offense is a "violent felony."

This case is an excellent vehicle to address this substantial gap in the interpretation and application of the ACCA. Failure-to-report escapes occur frequently, and as the body of appellate decisions ruling on whether such escapes are violent crimes indicates, they are often relied upon to support an enhanced sentence for armed career offenders. Failure-to-report escapes are not analogous to any of the crimes specifically enumerated as violent felonies in the ACCA. There is no ambiguity in the record that petitioner's prior conviction for "escape" under Illinois law was for a failure to report to confinement, not a physical break from a secure facility or the custody of a state official.

In short, this case provides a strong vehicle for this Court to address a question of statutory interpretation that its own recent decision indicates is urgently needed. There is a well developed split of authority on the question that, as Judge Posner's opinion indicates, will persist by force of circuit precedent in the absence of action by this Court. The petition should be granted.

1. Petitioner pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Pet. App. 1a. The

indictment also charged that petitioner had violated 18 U.S.C. § 924(e), the ACCA provision that provides for a mandatory minimum sentence of 15 years in prison for those violating § 922(g) who have previously committed three serious drug and/or violent felonies. *Id.* at 15a. The prosecution subsequently filed an information identifying the three predicate convictions it claimed were qualifying felonies under the ACCA that supported sentencing under 18 U.S.C. § 922(e). One of the convictions was for escape under Illinois law on June 30, 1999. *Id.* at 16a.

Illinois law defines an escape to include both breaking free from physical confinement (one who "escapes from any penal institution or from the custody of an employee of that institution") and also failure-to-report escapes (one who "knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement"). 720 ILCS 5/31-6(a). There is no dispute that Chambers's "escape" was a failure-to-report, the Illinois charging document made clear that petitioner had been charged with knowingly failing to report for incarceration on various dates. Pet. App. 22a.

The trial court held a sentencing hearing at which petitioner challenged the categorization of his failure-to-report escape conviction as a "violent felony" within the meaning of the ACCA. The district court, citing Seventh Circuit precedent, stated that "for reasons of simplicity ... escape is escape. And we're not going to get into the nuances of it for purposes of the sentencing statute." Pet. App. 27a. Following Seventh Circuit authority, the district court refused to treat a failure-to-report escape as different from a custodial escape, and thus concluded that petitioner was an armed "career offender under the statute." *Id.*

The conclusion that petitioner was an armed career offender under § 924(e) substantially enhanced his sentence, raising

his statutory minimum from 0 to 15 years, and his maximum from 10 years to life. Treating him as an armed career criminal, the district court also applied Section 4A1.4 of the Sentencing Guidelines, which incorporates the ACCA, resulting in a Guidelines range of 188 to 235 months. The district court sentenced petitioner to the low end of that range, 188 months, which is slightly above the statutory mandatory minimum of 15 years under the ACCA. Had he not been treated as an armed career criminal, petitioner's guidelines range would have been 130 to 162 months. Pet. App. 1a-2a. But he would not have been sentenced to more than 120 months because that would have been the statutory maximum for his offense.

2. Petitioner appealed his sentence, and the Seventh Circuit affirmed. Judge Posner's opinion for the court begins by noting that it "might [be] doubted" that a failure-to-report escape is typically or often a crime that poses a serious risk of physical harm to others. Pet. App. 2a. The opinion also explicitly acknowledges a split of authority regarding the treatment of failure-to-report escapes as a violent crime under the ACCA. *Id.* at 2a-3a. And the opinion further recognizes the propriety and ease of distinguishing a failure-to-report escape from "jail or prison breaks" for the purpose of determining whether the escape at issue is a violent crime under the ACCA. *Id.* at 3a.

Nonetheless, the panel chose to adhere to its own court's precedent and held that petitioner's failure-to-report escape was properly considered a violent felony under the ACCA. Pet. App. 3a-4a. Nonetheless, the opinion notes that the rule treating failure-to-report escapes like prison breaks "is an embarrassment to the law" because it is based on "a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses." *Id* at 4a. The decision further criticizes the reasoning of the "head of the line of cases that lump all escapes together, *United States* v. *Gosling*, 39 F.3d 1140,

1142 (10th Cir. 1994)" that every escape carries the potential for violence because of the "supercharged emotions" that may cause an escapee to "feel threatened by police officers, ordinary citizens, or even fellow escapees." Pet. App. 4a. According to the court, this rationale amounted to "ruminations [that] should not be treated as authoritative" for failure-to-report escapes. *Id.* at 5a. The Seventh Circuit casts further doubt on the majority view by noting that "if the courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of [failure-to-reports (according to a recent study, nearly 90%)] could well compel a conclusion that escape is never a crime of violence." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's opinion acknowledges two critical facts about the treatment of failure-to-report escapes: (1) there is a well developed split of authority regarding whether a failure-to-report escape should be deemed a "violent felony," and (2) the rationale for treating a failure-to-report escape as a "violent felony" is weak. These facts alone would warrant this Court's review. But review in this case has been made even more compelling by this Court's decision in *James*, which exposed the urgent need for this Court to address the proper standard for determining whether a crime, such as a failure-to-report escape, that is not analogous to those violent crimes specifically enumerated in the ACCA should be treated as a "violent felony" for purposes of the ACCA.

1. Ten courts, including the Seventh Circuit below, have stated that all escapes should be treated as a violent crime. Pet. App. 3a-4a (decision below); *Winn*, 364 F.3d at 12 (failure to return to halfway house); *Rivera*, 127 F. App'x at 545 (failure-to-report escape is a violent crime under ACCA) (citing *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002) (prisoner walking off from work program)); *Luster*, 305 F.3d at 202 (treating a conviction as a crime of violence even when

"the statute clearly extends to a 'walk away' from custody not involving any contemporary violence"); *Mathias*, 2007 WL 1097952, at *3-5 (walkaway from a work release program); *Ruiz*, 180 F.3d at 676-77 (walkaway from prison camp without barriers and armed guards); *Anglin*, 169 F. App'x at 975 (reasoning that any conviction under the federal escape statute, 18 U.S.C. § 751, is a crime of violence even though the statute extends to conduct as simple as reporting late to serve a sentence) (citing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999)); *Nation*, 243 F.3d at 472 (stating that "every escape, even a so-called 'walkaway' escape" is a crime of violence); *Turner*, 285 F.3d at 915-16 (failure to return to halfway house); *Gay*, 251 F.3d at 952-55 (walkaway from non-secure diversion center).[2] As the decision below notes, the rationale for this view that has been repeatedly cited and followed by various circuits was articulated by the Tenth Circuit in *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). *Gosling* was actually not a failure-to-report case, but involved "'willfully, unlawfully, and feloniously escap[ing] from ... [a] County Jail.'" *Id.* at 1142 (alterations and omission in original). Nonetheless, the *Gosling* court reasoned broadly:

> every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so. A defendant who escapes from a jail is likely to possess a variety of

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[2] Several of the cases involve appeals challenging the treatment of an escape as a "crime of violence" under the Sentencing Guidelines, U.S.S.G. § 4B1.2. The definition of "crime of violence" provided in that guideline provision is nearly identical to the definition of "violent felony" in the ACCA. *Compare* U.S.S.G. § 4B1.2, *with* 18 U.S.C. § 924(e)(2)(B). For that reason, lower courts have treated cases interpreting this guideline provision as no different from cases interpreting the ACCA, and vice-versa. *See Winn*, 364 F.3d at 9 n.1 (noting uniform view of courts that interpretation and application of Guidelines provision can be applied to ACCA).

> supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

Id. (internal citation omitted). The Tenth Circuit's reasoning was a material (and unnecessary) extension of the case upon which it relied, *United States* v. *Aragon*, 983 F.2d 1306 (4th Cir. 1993). In *Aragon*, the Fourth Circuit had held that escape from a federal prison was a crime of violence because of the circumstances of the prison custodial setting. *Id.* at 1313. That limited rationale would have been sufficient to support treating Gosling's escape from jail as a crime of violence. But the Tenth Circuit went further, looking beyond the circumstances of the case to the potential circumstances of the escapee's later apprehension.

Gosling's speculation regarding the potential for violence during recapture has proved the essential justification for treating failure-to-report escapes as violent crimes just like jail or prison breaks. *Winn*, 364 F.3d at 12 (treating failure to return to halfway house as violent crime because "there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody"); *Luster*, 305 F.3d at 202 (emphasizing that "the escapee must continue to evade police and avoid capture"); *Mathias*, 2007 WL 1097952, at *4 ("Even if the escape itself could somehow sidestep any potential risk of injury, the circumstances of recapture necessarily encompass just such a risk."); *Turner*, 285 F.3d at 916 ("there is no way to predict what an escapee will do when encountered by the authorities"). Indeed, the Seventh Circuit decision which bound the panel below specifically relied on the argument that "the potential for a violent confrontation arises between the defendant and law

enforcement during the attempted capture," even when the escape crime was a mere failure to report to a correctional facility or a halfway house. *United States* v. *Golden*, 466 F.3d 612, 614 (7th Cir. 2006), *petition for cert. filed*, No. 06-10751 (U.S. Apr. 9, 2007).

Two courts have openly rejected the rationale behind the majority view. The Ninth Circuit has specifically held that a failure-to-return escape is not a crime of violence. *Piccolo*, 441 F.3d at 1088-90. The Ninth Circuit noted that failure-to-report or walkaway escapes, do not involve the same risk of confrontation as an escape from secure confinement or physical custody. *Id.* at 1088. *Piccolo* squarely rejected *Gosling*, and its progeny, precisely because the danger to others posed by an escape from "a secured facility or the custody of an armed guard" is not present when the escapee leaves a halfway house with permission and fails to return. *Id.* at 1089.

The D.C. Circuit has specifically discussed the recapture rationale, and rejected it. *Thomas*, 333 F.3d at 282-83. After noting that numerous courts have followed the reasoning of *Gosling*, *Thomas* observed:

> While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of any lawbreaker. Thus, one might argue that under the approach of those circuits, all crimes become crimes of violence ....

Id. at 282. Though the *Thomas* court rejected the rationale of *Gosling*, it nonetheless concluded that the escape before it was a crime of violence because Thomas's crime was "escape from an officer," which creates a more apparent risk of violence. *Id.* at 283. Anticipating the analysis in *Piccolo*, the D.C. Circuit observed: "A prisoner not returning to a halfway house or sneaking away from an unguarded position in the night may not inherently create a risk of harm to others. A

prisoner escaping from the custody of an officer does create such an inherent risk." *Id.*

In the decision below, Judge Posner was bound by circuit precedent, but made clear his belief that there is substantial merit to the analyses of the Ninth and D.C. Circuits. He specifically recognized that this Court's decisions make it perfectly appropriate to distinguishing between an escape from physical custody on the one hand and a failure-to-report or walkaway escape on the other. "The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *United States* v. *Shepard*, 544 U.S. 13 (2005), to decide which bin a conviction for escape belonged in." Pet. App. 3a.[3] He also pointed to the absurdity of the majority rule: showing up an hour late to prison could result in a 15-year mandatory sentence under the ACCA. *Id.* at 2a.

Judge Posner's reservations about the result in this case were not sufficient, however, to overcome the force of circuit precedent. The same will remain true in the numerous other circuits where the decision has already been made, based on highly questionable reasoning, to treat all escapes as violent crimes. And the issue is likely to continue to arise with some frequency. As the substantial body of decisions in the lower courts demonstrates, a prior conviction for escape is commonly relied upon as a predicate violent crime to support an armed career offender sentence. Numerous statutes, including the Illinois statute at issue here, 720 ILCS 5/31-6(a), and the federal escape statute, have been interpreted or expressly define escape to include not only escape from the physical custody of a state official or secure facility, but also

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[3] This Court held in *Shepard* that a subsequent court trying to determine whether a prior conviction should be treated as a violent felony under the ACCA may consider "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." 544 U.S. at 16; *see also Taylor* v. *United States*, 495 U.S. 575, 600-02 (1990).

failures to report and walkaways from non-secure facilities. See, *e.g.*, *Anglin*, 169 F. App'x at 974-75 (discussing the breadth of the federal escape statute, 18 U.S.C. § 751); 18 Pa. Cons. Stat. Ann. § 5121(a) (defining escape to include "fail[ure] to return to official detention following temporary leave granted for a specific purpose or limited period"); N.J. Stat. Ann. 2C:29-5(a) (same); Ariz. Stat § 13-2501 (same); Cal. Penal Code § 4530 (subsection (c) defines escape to include the "willful failure ... to return" of those on temporary release); Ga. Code Ann. § 16-10-52 (subsection (a)(5) includes failure to return). Only this Court's intervention can resolve the split of authority and provide uniform treatment of this frequently invoked provision that produces such harsh sentences.

2. The need for this Court's review of this issue has been made even more urgent by this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007). In *James*, this Court held that attempted burglary, as defined by Florida law, is a violent felony for purposes of the ACCA's residual clause. *Id.* at 1590-91. The reasoning of the decision was, however, limited. This Court did not offer a generally applicable method for determining whether unenumerated crimes qualify as violent felonies under the ACCA's residual clause. The majority opinion did not purport to decide whether attempted burglary, if it were defined differently than it has been defined in Florida, would qualify as a violent felony under the residual clause. *Id.* at 1595-96. Instead, it simply determined that attempted burglary as defined by Florida law "poses the same kind of risk" as completed burglary (which is an enumerated violent felony under the ACCA), and hence is properly considered a violent felony under the residual clause. *Id.* at 1595.

The *James* majority concedes that it did not provide any guidance for lower courts with respect to whether a crime that is not analogous to one of the enumerated crimes in the ACCA is a violent felony. The majority acknowledged that

"provid[ing] guidance for the lower courts in future cases [is] surely a worthy objective." *Id.* at 1598. But *James* itself was not a proper case to do so because the case did not present such a crime, and certain issues relevant to the inquiry had not been briefed. *Id.*

Justice Scalia's dissenting opinion elaborated on why it is so important to provide a generally applicable, uniform standard that lower courts can use to decide whether an offense is a "violent felony" within the meaning of the ACCA: without such guidance, the court system is left without any way to provide "an acceptable degree of consistency by the hundreds of district judges that impose sentences every day." *Id.* at 1601 (Scalia, J., dissenting). The *James* dissent noted that there are numerous crimes that are not analogous to any of the enumerated offenses (burglary, arson, extortion, and crimes involving the use of explosives, 18 U.S.C. § 924(e)(2)(B)(ii)). Justice Scalia himself provided various examples: driving under the influence of alcohol, 127 S. Ct. at 1601-02 (Scalia, J., dissenting) (citing *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (driving under the influence of alcohol does not pose a "substantial risk that physical force against the person or property of another may be used" under 18 U.S.C. § 16(b)), and operating a dump truck without the consent of the owner, *id.* at 1606 n.4 (Scalia, J., dissenting) (citing *United States* v. *Johnson*, 417 F.3d 990 (8th Cir. 2005)). The list could readily be multiplied: felon in possession of a firearm, *United States* v. *Doe*, 960 F.2d 221, 222 (1st Cir. 1992) (Breyer, C.J.) (holding that possession of firearms is not violent but noting split of authority), unlawful transportation of hazardous chemicals, which then-Chief Judge Breyer hypothesized in *Doe*, *id.* at 225, attempting to elude a police vehicle, *United States* v. *Kelly*, 422 F.3d 889, 893 (9th Cir. 2005) (holding this offense was not a crime of violence), and resisting arrest, *United States* v. *Wardrick*, 350 F.3d 446, 455 (4th Cir. 2003) (holding that resisting arrest is a crime of violence). The controlling opinion in *James* says nothing at all about how

lower courts are supposed to determine whether any crime which is not analogous to one of the enumerated crimes in the ACCA is a violent felony.

This case presents an ideal vehicle for resolving this unanswered question, and providing lower courts a generally applicable standard for determining whether crimes that are not analogous to the enumerated crimes in the ACCA fall within the ACCA's residual provision for violent felonies. *Both* the majority and the dissent in *James* acknowledged that the crime of escape is not analogous to any of the enumerated offenses. *James*, 127 S. Ct. at 1598; *id.* at 1606 n.4 (Scalia, J., dissenting). And *both* the majority and the dissent in *James* recognize that providing a generally applicable standard for such crimes is a "worthy objective." *Id.* at 1598; *id.* at 1602 (Scalia, J., dissenting) ("Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the ACCA's residual provision, yet its boundaries are ill defined."). Indeed, the urgency of providing some generally applicable guidance is heightened by the concern that the statute is otherwise impermissibly vague. *Id.* at 1609 (Scalia, J., dissenting) (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)).

3. Accepting review of this case will also provide this Court with an opportunity to place a principled limit on the scope of the residual clause. The *Gosling* rationale for treating failure-to-report escapes as violent crimes is essentially without limit, as the D.C. Circuit in *Thomas* correctly recognized. If the fear of recapture is sufficient to give rise to a "serious potential risk of injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), then it is hard to see what crime is not a violent felony under the ACCA. All crimes carry a risk of detection and, even if no detection occurs in the commission of the crime, there always remains the risk of subsequent capture. *Thomas*, 333 F.3d at 282. There is no reason to believe that individuals who fail to report for custody are

especially likely to engage in violence if confronted by an officer seeking to capture them. *Golden*, 466 F.3d at 615 (Rovner, J., concurring) (arguing that, unlike escape from custody, the "mere failure to report to custody in the first instance does not reflect" a specific inclination to resist or evade restraint).

Needless to say, any reading of the residual provision that expands it to encompass all or nearly all crimes is problematic. The text of the statute cannot be squared with the view that Congress intended to impose its substantial penalty (a 15-year mandatory minimum) for just any armed repeat offender. The statute singles out certain of the most dangerous and socially destructive armed repeat offenders: those with a history of violent felonious conduct and repeat drug offenders. 18 U.S.C. § 924(e); H.R. Rep. No. 98-1073, at 1-3 (1984) (discussing purpose of the enhanced penalty, which was to incapacitate the kinds of repeat violent offenders that studies had shown were responsible for a high volume of violent crime). "If Congress wanted ... [to] subject[] *all* repeat offenders to a 15-year mandatory prison term[,] it could very easily have crafted a statute which said that. ACCA ... was obviously not meant to have such an effect." *James*, 127 S. Ct. at 1609 (Scalia, J., dissenting); *Doe*, 960 F.2d at 225 (refusing to treat a conviction for being a felon in possession of a firearm as a violent crime because to do so would "bring within the statute's scope a host of other crimes that do not seem to belong there").

Further, the broad reading of the residual provision that is necessary to conclude that failure-to-report escapes are violent crimes is inconsistent with the language of the ACCA. As then-Chief Judge Breyer observed, "The statute gives several specific examples-- burglary, arson, extortion, use of explosives -- and then adds, 'or otherwise involves *conduct* that presents a serious potential risk of physical injury to another.'" *Id.* at 224. When the act of committing the crime at issue does not involve the serious potential for "active

violence," *id.* at 225, then the text of the statute points away from its inclusion as a "violent felony." See *Leocal* v. *Ashcroft*, 543 U.S. 1, 10-11 (2004) (defining "crime of violence" under 18 U.S.C. § 16(b) to mean "violent, active crimes").

This Court in *James* suggested that some limits to the residual clause are still waiting to be articulated. The Court concluded that Florida's version of attempted burglary, which required proof of an overt act to enter a structure, *James*, 127 S. Ct. at 1594, carried a sufficient potential risk of violence to satisfy the residual clause. But, this Court noted, other jurisdictions allowed convictions for attempted burglary based on conduct that poses a lesser risk of confrontation with others. *Id.* at 1596 n.4 (collecting cases where burglary was defined to include merely "making a duplicate key" or "casing [a] building" or neighborhood). While this Court withheld any judgment as to those statutes, it noted that the risk of violence presented by such crimes was "more attenuated." *Id.* at 1596.

This case presents a crime with a substantially "attenuated" risk of violent confrontation. A failure-to-report escape does not involve any active violence. Quite the contrary, a failure-to-report escape involves no *action* at all; it is a crime of *inaction*. There is no risk of violence in the commission of such a crime precisely because there is no risk of confrontation in the commission of the crime. The individual who fails to report is choosing *not* to come into contact with others, or expose himself to coming into contact with law enforcement officials. The only risk of violence that has even been considered by the lower courts is not in the commission of a failure-to-report escape (as opposed to an escape from the physical custody of an officer or a secure facility), but rather in the potential for subsequent apprehension. This Court should specifically rule that the risk of violence in subsequent apprehension may not, standing alone, provide the requisite

"serious potential risk" of harm to others for purposes of the residual clause. 18 U.S.C. § 924(e).

Petitioner acknowledges, as the Seventh Circuit emphasized below, that there is a dearth of statistical evidence concerning how frequently failure-to-report or walkaway escapes result in violence. Pet. App. 5a-6a. But this should not deter this Court from engaging this question now. Courts are today being forced to apply this statute to crimes that are not analogous to the enumerated violent felonies in the ACCA. Decisions are, therefore, being made routinely on less than perfect information. See *James*, 127 S. Ct. at 1608 (Scalia, J., dissenting) (noting that deciding whether to treat a crime as falling within the residual provision without hard statistics "is an imponderable that cannot be avoided"). And there is no way of knowing when the hoped-for data will emerge, not only for failure-to-report escapes, but also for the myriad other crimes that arguably fall within the residual provision but are not analogous to any enumerated crime.

Also, it remains for this Court to decide which way the lack of data cuts. It makes little sense to place upon the defendant the burden of presenting data that a crime only infrequently, if at all, involves harm to others, when it is the prosecution that is seeking to enhance the defendant's sentence based on its argument that the crime is a "violent felony" within the meaning of the ACCA. Indeed, as Justice Thomas has observed, and again pointed out in his dissent in *James*, 127 S. Ct. at 1610 (Thomas, J., dissenting), allowing a judge to resolve the contested question whether a particular prior conviction was, in fact, for a "violent felony" raises serious constitutional concerns under the Sixth Amendment. *Shepard*, 544 U.S. at 27 (Thomas, J., concurring). Those concerns are heightened when a court is asked to review potentially contested data and make a finding of fact regarding the allegedly "violent" nature of a particular crime. If such statistical evidence is necessary at all, the prosecution should be required to produce it because the government

carries the burden of establishing that the defendant has three prior convictions qualifying under the ACCA.

* * * *

In the end, this case presents this Court with an excellent vehicle to resolve a split of authority concerning a frequently recurring issue in federal criminal law. More broadly, this case provides this Court with an opportunity to provide generally applicable standards for how lower courts should determine whether a crime that is not analogous to enumerated crimes in the ACCA falls within the residual clause. This Court has already indicated in *James* that articulating such a standard is desirable. This is especially so in light of the fact that, absent this Court's guidance, the lower courts are articulating expansive rationales that cause the residual clause to encompass crimes far beyond the ACCA's text and purpose. This Court's review is urgently needed.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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06-1206

CERTIFICATE OF SERVICE

No. 06-

Deondery Chambers,

Petitioner,

v.

United States of America,

Respondent.

Supreme Court, U.S.
FILED
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No. 06-11206

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DEONDERY CHAMBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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SUPREME COURT, U.S.
2007 JUL 15 P 4:46

QUESTION PRESENTED

Whether petitioner's prior conviction for escape constituted a violent felony under the Armed Career Criminal Act, 18 U.S.C. 924(e).

IN THE SUPREME COURT OF THE UNITED STATES

No. 06-11206

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 473 F.3d 724.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2007. A petition for rehearing was denied on February 16, 2007. Pet. App. 14a. The petition for a writ of certiorari was filed on May 8, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Illinois to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). He was sentenced to 188 months of imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). The court of appeals affirmed. Pet. App. 1a-6a.

1. The ACCA mandates a minimum prison term of 15 years of imprisonment for any person convicted of being a felon in possession of a firearm if that person has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e). The ACCA defines "violent felony," in relevant part, as any crime "punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).[1]

2. A federal grand jury charged petitioner with possessing a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Following petitioner's arraignment on the felon in possession charge, the government filed an information charging him with an enhanced sentence under the ACCA because of his three prior

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[1] Where the ACCA does not apply, Section 924(a)(2) provides for a 10-year maximum term of imprisonment for persons convicted of violating Section 922(g).

Illinois felony convictions, for aggravated robbery in 1998, for unlawful delivery of a controlled substance within 1,000 feet of public housing in 1999, and for escape in 1999. Pet. C.A. Br. App. 8.

Petitioner did not challenge the use of his first two convictions, but he did challenge the characterization of his escape conviction as a violent felony, because it involved his failure to return from furlough or work release on three occasions. Pet. C.A. Br. 4-5. The district court overruled that objection and held that petitioner was an armed career criminal. The court determined that petitioner's advisory guidelines range was 188 to 235 months of imprisonment, and it imposed a prison sentence of 188 months. Gov't C.A. Br. 4.

The court of appeals, adhering to its precedents -- including United States v. Golden, 466 F.3d 612 (7th Cir. 2006), pet. for cert. pending, No. 06-10751; and United States v. Bryant, 310 F.3d 550 (7th Cir. 2002) -- held that petitioner's prior escape conviction fell within Section 924(e)(1)'s requirement that the offense "involves conduct that presents a serious potential risk of physical injury to another." Pet. App. 2a-4a. While the court expressed some doubt as to whether the type of escape offense at issue here involved a serious potential risk of physical injury, the court deemed itself bound by its recent precedent, and it noted that it lacked empirical data to support distinguishing between

walkaway escapes and other escapes with respect to the potential for violence. Id. at 4a-6a.

ARGUMENT

Petitioner renews his claim (Pet. 8-19) that escape accomplished by a failure to return to confinement is not a violent felony under the ACCA. That claim lacks merit and does not warrant further review by this Court.

1. A prior conviction for a "crime punishable by imprisonment for a term exceeding one year" qualifies as a "violent felony" under Section 924(e) if the offense meets certain criteria set out in the statute or "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court held in Taylor v. United States, 495 U.S. 575 (1990), that Section 924(e) generally requires a "categorical approach" to determining whether or not a prior offense constitutes a "violent felony" within the meaning of Section 924(e)(2)(B). 495 U.S. at 600-602. Under that "categorical approach," sentencing courts must "look only to the statutory definitions of the prior offenses, and not to the particular facts underlying th[e] convictions." Ibid.

In United States v. Moudy, 132 F.3d 618, 620 (1998), the Tenth Circuit held that the crime of escape meets the Section 924(e)(2)(B)(ii) definition of a violent felony because the offense poses "a serious potential risk of physical injury to another." As

the court explained:

> [E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so. A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

Ibid. (quoting United States v. Gosling, 39 F.3d 1140 (10th Cir. 1994)).

Petitioner argues (Pet. 15-17) that a "failure to report" offense creates no risk of injury to another because it is a "passive offense." Petitioner is incorrect. As explained above, whether an offense creates a serious risk of injury to another does not depend on the particular facts underlying a conviction, but rather on the statutory definition of the offense. As a general matter, escape itself -- whether or not accomplished in a violent manner -- presents a "powder keg" situation and gives rise to a serious risk of physical injury. Moudy, 132 F.3d at 620. As the Tenth Circuit stated in United States v. Turner, 285 F.3d 909 (2002), in finding that an escape conviction based on a failure to return from work release was a crime of violence, "[e]ven though initial circumstances of an escape may be non-violent, there is no way to predict what an escapee will do when encountered by

authorities." Id. at 915-916. That rationale also applies to offenders who fail to report to jail following work release or furloughs.

2. Other circuits have agreed that an escape conviction qualifies categorically as a "violent felony" under the ACCA. United States v. Wardrick, 350 F.3d 446, 455 (4th Cir. 2003), cert. denied, 541 U.S. 966 (2004); United States v. Franklin, 302 F.3d 722, 724 (7th Cir. 2002), cert. denied, 537 U.S. 1095 (2002); United States v. Jackson, 301 F.3d 59, 62 (2d Cir. 2002), cert. denied, 539 U.S. 952 (2003); United States v. Hairston, 71 F.3d 115, 117-118 (4th Cir. 1995), cert. denied, 517 U.S. 1200 (1996).[2] The Tenth Circuit, like the Eighth Circuit, has reached the same conclusion about "failure to return" offenses. See United States v. Maddox, 388 F.3d 1356, 1368-1369 (10th Cir. 2004) (failure to return from work-release program); United States v. Adams, 442 F.3d 645 (8th Cir. 2006) ("We see no material distinction between

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[2] Numerous courts have held that escape convictions categorically constitute a "crime of violence" under the identical language of the career offender Guideline, § 4B1.2. See, e.g., United States v. Winn, 364 F.3d 7, 12 (1st Cir. 2004); United States v. Thomas, 361 F.3d 653, 657-660 (D.C. Cir. 2004), vacated and remanded on other grounds, 543 U.S. 1111 (2005); United States v. Bryant, 310 F.3d 550, 554 (7th Cir. 2002); United States v. Luster, 305 F.3d 199, 202 (3d Cir. 2002), cert. denied, 538 U.S. 970 (2003); United States v. Gay, 251 F.3d 950, 954-955 (11th Cir. 2001) (per curiam); United States v. Ruiz, 180 F.3d 675, 676-677 (5th Cir. 1999); United States v. Harris, 165 F.3d 1062, 1068 (6th Cir. 1999); United States v. Dickerson, 77 F.3d 774, 777 (4th Cir.), cert. denied, 519 U.S. 843 (1996).

'walkaway' escape and failure to return to confinement."), cert. denied, 127 S. Ct. 2095 (2007); see also United States v. Golden, 466 F.3d 612 (7th Cir. 2006) (holding that conviction for failure to report to county jail is a violent felony under the ACCA).

Petitioner relies (Pet. 11) on United States v. Piccolo, 441 F.3d 1084 (2006), where the Ninth Circuit disagreed with the uniform view of the other circuits, see n.2, supra, and concluded that a walkaway escape from a halfway house was not a "crime of violence" under Guidelines § 4B1.2(a)(2). 441 F.3d at 1086-1090.[3] Review is not warranted based on that decision. Although the reasoning of the Ninth Circuit in Piccolo appears to signal that the court would reach the same conclusion with regard to the question whether escape is a violent felony under the ACCA, to date it has only addressed the analogous question under the Sentencing Guidelines.[4] Because the Sentencing Commission is charged by Congress with "periodically review[ing] the work of the courts" in applying the (now-advisory) Guidelines and making "whatever

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[3] Petitioner also relies on dictum in United States v. Thomas, 333 F.3d 280 (D.C. Cir. 2003), where the court expressed doubt whether a walkaway escape would qualify as an escape under § 4B1.2 of the Guidelines. Id. at 282-283. The court ultimately held, however, that the offense involved in that case -- escape from a police officer -- was a violent felony under the Guidelines. Id. at 283.

[4] Petitioner notes (Pet. 13) that the Ninth Circuit has applied Piccolo to other escape offenses, but all of those cases have involved the classification of escapes under the Guidelines, not the ACCA.

clarifying revisions to the Guidelines conflicting judicial decisions might suggest," Braxton v. United States, 500 U.S. 344, 348 (1991), the Ninth Circuit's decision in Piccolo does not warrant review of the statutory question presented in this case. See also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").[5]

3. This Court's decision in James v. United States, 127 S. Ct. 1586 (2007), provides no basis for granting the petition in this case. James held that attempted burglary of a dwelling under Florida law is a "violent felony" within the meaning of the ACCA. This case, in contrast, concerns the crime of escape from a penal institution, and therefore presents a different question from the one presented in James. The Court in James, moreover, made clear that Taylor's categorical approach does not "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can

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[5] Petitioner relies (Pet. 14, 18) on Judge McKay's concurring opinion in United States v. Adkins, 196 F.3d 1112, 1118 (10th Cir. 1999), but the Adkins decision in fact affirmed the imposition of an ACCA-enhanced sentence based in part upon a prior escape conviction. In any event, the Tenth Circuit's established position, as expressed in Moudy and United States v. Turner, 285 F.3d 909 (2002), is that escape convictions of all types are predicate offenses under the ACCA.

be deemed a violent felony." 127 S. Ct. at 1597. Following this Court's decision in James, the Court denied petitions for writs of certiorari presenting virtually the same question as the petition in this case in Adams v. United States, 127 S. Ct. 2095 (2007) (No. 06-6541), and Ballard v. United States, 127 S. Ct. 2094 (2007) (No. 06-5729).[6] There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2007

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[6] Petitioner notes (Pet. 18) that Judge Posner in this case desired to see statistics on how often failure-to-report or walkaway escapes present a serious potential risk to the public or to law enforcement officers. While such statistics may be helpful, James indicates that they are not required. 127 S. Ct. at 1598. And petitioner acknowledges that he has no statistics to support his suggestion that walkaway escapes pose a lesser danger than is required to satisfy the ACCA.

No. 06-11206

IN THE SUPREME COURT OF THE UNITED STATES

DEONDERY CHAMBERS, PETITIONER

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UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION,** via e-mail and first-class mail, postage prepaid, this **16th day of July, 2007**.

[See Attached Service List]

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July 16, 2007

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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10 (5) July 25, 07

No. 06-11206

IN THE

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DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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DEONDERY CHAMBERS,

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UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

The government's Brief in Opposition never engages the substantial grounds for granting certiorari in this case. The government tries to avoid the question presented entirely by ignoring the record in this case and the undisputed application of this Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *United States* v. *Shepard*, 544 U.S. 13 (2005). Contrary to the government's argument, Opp. 4-5, this case is not about whether a non-specific crime of "escape" is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). The underlying offense at issue was properly understood by the Seventh Circuit as a mere failure to report for confinement. The question is whether such a failure to report for confinement is a "violent felony" under the ACCA.

The government pretends there is no split of authority on that question, but only by baselessly trying to confine the

Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (9th Cir. 2006), to the career offender provision of the Sentencing Guidelines. In attempting to so confine *Piccolo*, the government ignores both the language of the ACCA, which even the government acknowledges is "identical" to the career offender Guideline, Opp. 6 n.2, and the numerous courts of appeals that have held that the career offender Guideline and the ACCA should be interpreted to mean the same thing. Even more importantly, the split of authority implicated in this case has deepened since the petition was filed, with the Sixth Circuit holding that a failure-to-report escape under Michigan law is not a violent felony under the ACCA. *United States* v. *Collier*, No. 06-1395, 2007 U.S. App. LEXIS 16598, at *7-15 (6th Cir. July 12, 2007).

Finally, the government inexplicably argues that this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007), does not support certiorari because it "presents a different question" from that presented here. Opp. 8. But that is precisely the point. As detailed in the petition, *James* left open what both the majority and dissenting opinions recognized as an important question under the ACCA: what is the standard for determining when a crime that is not analogous to those enumerated in the ACCA qualifies as a "violent felony." This Court in *James* chose not to answer that question because the crime in that case was analogous to an enumerated crime. This admittedly different case presents that important question, which this Court should resolve here.

1. The government admits that there is no doubt that petitioner's underlying conviction for "escape" under Illinois law was for "failure to return from furlough or work release." Opp. 3. Because the basis of petitioner's conviction for "escape" was not in doubt—it was undisputed that the Illinois charging document had made clear that petitioner's escape charge was based on his failure to report for incarceration, Pet. App. 22a—petitioner does not ask whether the generic crime of "escape" is a "violent felony" under the ACCA.

Petitioner asks instead whether the more specific kind of "escape" that he had committed—failing to report to a penal institution—is a violent felony. *Id.* at 3a.

The government refuses even to acknowledge that this case presents the question whether a failure-to-report escape is a violent felony under the ACCA. Instead, the government asserts that under *Taylor* this Court should refuse to acknowledge that petitioner's "escape" was a failure-to-report, and not a custodial escape. The only reason the government gives for this sleight of hand around the actual question presented by the petition is that *Taylor* held that the question "whether an offense creates a serious risk of injury to another does not depend on the particular facts underlying a conviction, but rather on the statutory definition of the offense." Opp. 5. What the government has not acknowledged, however, is that, under both *Taylor* and *Shepard*, to define the "offense," a court should look not only to the statute, but also to, among other things, "the charging document." *Shepard*, 544 U.S. at 16; see also *Taylor*, 495 U.S. at 600-02. The government has simply mischaracterized the "categorical" rule of *Taylor* as if it required looking only to the statute of conviction, with the result that it treats petitioner's offense as if it were in a more generic category (escape, undifferentiated) than this Court's decisions place it (failure-to-report escape).[1]

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[1] Even if a court were supposed to confine itself to the text of the statute under which the defendant is convicted, which is *not* the rule of *Taylor* and *Shepard*, petitioner's offense would still properly be defined not as generic escape, but more narrowly as non-custodial escape. The offense of conviction at issue here is 720 ILCS 5/31-6(a), which reads as follows:

> A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work

Not only are *Taylor* and *Shepard* clear on this point, but the Seventh Circuit, in the decision under review, said that it would be appropriate to "divid[e] escapes, for purposes of 'crime of violence' classification, into jail or prison breaks on the one hand and walkaways, failures to report, and failures to return, on the other." Pet. App. 3a. Though apparently of a contrary view, the government fails even to cite this passage of Judge Posner's decision, much less explain why it is wrong. In fact, Judge Posner is correct, as both *Taylor* and *Shepard* make clear. The offense for purposes of the violent felony inquiry under the ACCA here is a failure-to-report escape.

2. The government also ignores substantial authority in its effort to make the split of authority in this case disappear. The government acknowledges that the Ninth Circuit in *Piccolo* held that a non-custodial walkaway escape from a halfway house is not a crime of violence under the career offender Guideline. Opp. 7. While admitting that the reasoning in *Piccolo* appears equally applicable to the ACCA, the government nonetheless suggests that the absence of a Ninth Circuit decision strictly so holding means there is no present split of authority. *Id.* But, as petitioner pointed out, Pet. 9 n.2, the uniform view of lower courts is that the interpretation of the career offender Guideline is applicable to the ACCA violent felony provision, and vice-versa. *United States* v. *Winn*, 364 F.3d 7, 9 n.1 (1st Cir. 2004); *United States* v. *Mathias*, 482 F.3d 743, 747 n.2 (4th Cir. 2007), *petition for cert. filed*, No. 07-61 (U.S., July 12, 2007); *Collier*, 2007 U.S. App. LEXIS 16598, at *4 n.3; *United States* v. *Savage*, No. 06-30451, 2007 U.S. App. LEXIS 13713, at *12 (9th Cir.

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and day release or who knowingly fails to abide by the terms of home confinement is guilty of a Class 3 felony.

This statute expressly distinguishes between custodial escape, which is a Class 2 felony, and non-custodial escape, including failure to report or return from furlough or work release, which is a Class 3 felony. It is undisputed that petitioner's underlying offense was in the latter category.

June 12, 2007); *United States* v. *Shipp*, No. 06-5056, 2007 U.S. App. LEXIS 11760, at *11 (10th Cir. May 17, 2007); *United States* v. *Taylor*, No. 06-13139, 2007 U.S. App. LEXIS 13822, at *3-4 (11th Cir. June 13, 2007).

Furthermore, the government offers no explanation for why the two provisions should have any different meaning. To the contrary, the government expressly recognizes the "identical language" of the career offender Guideline and the ACCA. Opp. 6 n.2. The government is unable to produce a principle of law or sound policy that would counsel in favor of treating the two provisions differently. There is none. *Piccolo*, then, creates a live split of authority warranting this Court's review.

Significantly, the split has also deepened since the petition was filed. On July 12, 2007, the Sixth Circuit distinguished its prior decisions in *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999), and *United States* v. *Anglin*, 169 F. App'x 971 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1249 (2007), and concluded that a failure-to-report escape under Michigan law is not a violent felony under the ACCA. *Collier*, 2007 U.S. App. LEXIS 16598, at *6-15. The Sixth Circuit expressly noted the split of authority on the question, *id.* at *8, and concluded that the only rationale that has ever been offered for treating failure-to-report escapes as violent felonies under the ACCA—that violence may ensue upon subsequent capture—does not apply to failure-to-report escapes in Michigan. *Id.* at *11-15. As the Sixth Circuit observed, Collier's

> "escape" was simply stepping off a public Greyhound bus—where he was unaccompanied by any correctional officials—and failing to report to the facility to which he was being transferred. We doubt that a statute covering this "failure to report" variety of escape necessarily "involves conduct that presents a serious potential risk of physical injury to another."

Id. at *8 (quoting 18 U.S.C. § 924 (e)(2)(B)).

The D.C. Circuit had explained in *United States* v. *Thomas*, 333 F.3d 280, 282-83 (D.C. Cir. 2003), why the risk of violence upon subsequent capture "proves too much," *Collier*, 2007 U.S. App. LEXIS, at *9, and would logically entail treating all crimes as crimes of violence.[2] *Collier* and *Thomas* and *Piccolo*, 441 F.3d at 1089, and Judge Posner's discussion below, Pet. App. 2a, all reflect the common-sense reaction that a *failure* to come into contact with law enforcement officials by *failing* to report for confinement does not create a "serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).[3] Justice Scalia's dissent in

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[2] The D.C. Circuit has since held that a non-custodial escape is a violent felony. *United States* v. *Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006). It is noteworthy, however, that in so holding, the D.C. Circuit did not confront the persuasive *dicta* in *Thomas* that argued against treating non-custodial escapes as violent felonies. Instead, the D.C. Circuit first reconsidered the issue in a case, coincidentally also captioned *United States* v. *Thomas*, where the factual record and the statute of conviction left the court uncertain whether the underlying escape conviction was custodial or not. *United States* v. *Thomas*, 361 F.3d 653, 658-60 (D.C. Cir. 2004) (defendants merely "hypothesize" that their underlying escape crimes were non-custodial, but point to no charging document or other properly considered evidence to support the hypothesis), *vacated*, 543 U.S. 1111 (2005). *Adewani* subsequently applied the result in the second *Thomas* decision, without any further explanation, under circumstances where it may have been clear that the defendant's underlying crime was a non-custodial walkaway offense. 467 F.3d at 1342 (noting Adewani's "conten[tion]" that his convictions were for "walking away from halfway houses" and never questioning his contention).

[3] The result in *Collier* did not rest "solely" on the distinction between custodial and non-custodial escapes. *Collier*, 2007 U.S. App. LEXIS 16598, at *11. The Sixth Circuit also determined that a failure-to-report escape under Michigan law is not a violent felony because Michigan does not treat "escape" as a continuing offense. *Id.* at *11-15. Whether a state chooses to define "escape" as a continuing offense or not does not change the fact that the potential for violence from a failure-to-report escape arises *only* from the attempt to capture the offender, not from any conduct that the offender must undertake to commit the offense. In any event, *Collier*'s additional reason for treating failure-to-report escapes under

James specifically noted that treating walkaway escapes as violent felonies suggests that "virtually any crime could qualify." 127 S. Ct. at 1606 n.4 (Scalia, J., dissenting). And petitioner argued that this case presents this Court with an opportunity to place some principled limit on this rationale so that the ACCA does not expand far beyond its intended scope. Pet. 15-18. The government, which merely parrots the view that the risk of subsequent capture supports treating all categories of escape as violent felonies, Opp. 5-6, offers no substantive response.

3. Finally, the government simply never disputes, or even discusses, the fact that both the majority and dissenting opinions in *James* expressed the view that the standard for determining when an unenumerated offense that is not analogous to any enumerated offense under the ACCA is a violent felony remains an unresolved and important question of law. Pet. 13-15. The government likewise never disputes that the crime at issue here—a failure-to-report escape—would provide this Court with an opportunity to provide some much needed guidance on that issue.[4]

* * * *

In sum, the Opposition fails to undermine any of the compelling reasons to grant certiorari here. This case presents a split of authority on a recurring issue of federal law that the opinions in *James* stated would benefit from

---

Michigan law differently from other escapes only furthers the difference of opinion in the lower courts, underscoring the need for this Court's review.

[4] The government argues that this Court's previous denial of certiorari in two cases where the certiorari papers were filed prior to *James* supports denial of certiorari here. Opp. 9; *see Adams* v. *United States*, 127 S. Ct. 2095 (2007); *Ballard* v. *United States*, 127 S. Ct. 2094 (2007). But the fact that those petitions could not have briefed the import of this Court's decision in *James* shows that those prior denials are of no significance here. Unlike here, the Court in those cases did not have the benefit of the parties' presentation of the issues raised by *James*.

consideration by this Court. The expansive view of the ACCA that underlies petitioner's enhanced sentence requires some limiting principle that only this Court can provide.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Robert N. Hochman /ral

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July 25, 2007

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CERTIFICATE OF SERVICE

No. 06-11206

Deondery Chambers,

Petitioner,

v.

United States of America,

Respondent.

I, Robert N. Hochman, do hereby certify that, on this twenty-fifth day of July, 2007, I caused one copy of the Petitioner's Reply Brief in the foregoing case to be served by an overnight delivery service on the following party:

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110

No. 06-11206

Supreme Court, U.S.
FILED
JUL 30 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX: VOLUME I OF II

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PETITION FOR CERTIORARI FILED MAY 8, 2007
CERTIORARI GRANTED APRIL 21, 2008

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 4:05-cr-40044-JLF-1

UNITED STATES OF AMERICA,
Plaintiff,

v.

DEONDERY L. CHAMBERS, II,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
07/06/2005	1	INDICTMENT as to Deondery Lazar Chambers, II (1) count 1. (jep) (Entered: 07/06/2005)
		* * *
07/27/2005	6	Minute Entry for proceedings held before Judge Philip M. Frazier: Initial Appearance and Arraignment as to Deondery Lazar Chambers II (1) Count 1 held on 7/27/2005. Attorney Daniel G. Cronin for Deondery Lazar Chambers, II present, and FPD's office appointed. Not guilty plea entered. Oral motion for pretrial detention set for hearing 8/1/2005, 09:15 AM before Judge Frazier in Benton. Final Pretrial Conference set for 9/26/2005 09:30 AM in Benton Court House before Judge James L. Foreman. Jury Trial set for 10/3/2005

DATE	NO.	PROCEEDINGS
		09:30 AM in Benton Court House before Judge James L. Foreman. (Tape #FTR.) (krm) (Entered: 07/28/2005)
		* * *
07/27/2005	10	ORDER OF TEMPORARY DETENTION as to Deondery Lazar Chambers, II. Detention Hearing set for 8/1/2005 09:15 AM in Benton Court House before Judge Philip M. Frazier. Signed by Judge Philip M. Frazier on 7/27/2005. (krm) (Entered: 07/28/2005)
		* * *
07/29/2005	12	INFORMATION TO ESTABLISH PRIOR CONVICTION as to Deondery Lazar Chambers, II (Norwood, George) (Entered: 07/29/2005)
		* * *
08/01/2005	14	Minute Entry for proceedings held before Judge Philip M. Frazier: Detention Hearing as to Deondery Lazar Chambers, II held on 8/1/2005. Motion for pretrial detention granted. Order to enter. (Court Reporter Jane Northcutt, Northcutt Reporting.) (krm) (Entered: 08/01/2005)
08/03/2005	15	ORDER OF DETENTION as to defendant [Deondery Lazar Chambers, II]; defendant COMMITTED to the custody of the Attorney General of the United States. Signed by Judge Philip M. Frazier on 8/1/05. (mta) (Entered: 08/03/2005)

DATE	NO.	PROCEEDINGS
		* * *
11/17/2005	26	Minute Entry for proceedings held before Judge J. Phil Gilbert (vlm): Change of Plea Hearing as to Deondery Lazar Chambers, II held on 11/17/2005. Defendant entered open plea to count 1 of the Indictment. Sentencing set for 2/27/2006 01:30 PM in Benton Court House before Judge James L. Foreman. Defendant remanded to the custody of the U.S. Marshal. (Court Reporter Jane McCorkle) (vlm) (Entered: 11/17/2005)
		* * *
04/12/2006	29	SEALED OBJECTION TO PRESENTENCE INVESTIGATION REPORT by Deondery Lazar Chambers, II (Kavanaugh, Phillip) (Entered: 04/12/2006)
		* * *
05/11/2006	33	SENTENCING MEMORANDUM *SEALED* as to Deondery Lazar Chambers, II (Attachments: # 1 # 2 # 3 # 4 # 5)(Kavanaugh, Phillip) (Entered: 05/11/2006)
05/11/2006	36	SEALED RESPONSE by USA as to Deondery Lazar Chambers, II re 29 Objection to Presentence Investigation Report (Norwood, George) (Entered: 05/11/2006)
05/12/2006	37	Minute Entry for proceedings held be-

DATE	NO.	PROCEEDINGS
		ore Judge G. Patrick Murphy (vlm): Sentencing held on 5/12/2006 for Deondery Lazar Chambers, II (1), Count(s) 1; defendant committed to the custody of the USBP for a term of 188 months. Upon release from imprisonment, defendant on supervised release for a term of 5 years. Defendant to pay a $100.00 special assessment and a $750.00 fine (interest waived). Court grants the Government's oral motion to temporarily withdraw Exhibit 2 (videotape) and it shall be substituted with a copy. Defendant remanded to the custody of the U.S. Marshal. (Court Reporter Jane McCorkle) (vlm,) (Entered: 05/12/2006)
05/12/2006	38	EXHIBIT/WITNESS LIST as to Deondery Lazar Chambers, II regarding 5/12/06 sentencing hearing (vlm,) (Entered: 05/12/2006)
05/12/2006	39	SEALED PRESENTENCE INVESTIGATION REPORT as to Deondery Lazar Chambers, II (vlm,) (Entered: 05/12/2006)
05/12/2006	40	SEALED ADDENDUM TO PRESENTENCE INVESTIGATION REPORT as to Deondery Lazar Chambers, II (vlm,) (Entered: 05/12/2006)
		* * *
05/16/2006	42	JUDGMENT as to Deondery Lazar Chambers, II. Signed by Judge G. Patrick

DATE	NO.	PROCEEDINGS
		Murphy on 5/16/06. (tjh) (Entered: 05/17/2006)
		* * *
05/17/2006	44	NOTICE OF APPEAL by Deondery Lazar Chambers, II re 42 Judgment Filing fee $ 455. (Kavanaugh, Phillip) (Entered: 05/17/2006)
		* * *
05/22/2006	47	USCA Case Number 06-2405 assigned as to Deondery Lazar Chambers, II 06-2405 for 44 Notice of Appeal - Final Judgment. (vlm,) (Entered: 05/22/2006)
06/16/2006	48	TRANSCRIPT of Change of Plea as to Deondery Lazar Chambers, II held on November 17, 2005 before Judge Gilbert. Court Reporter: Jane McCorkle. This is a text entry only - no document is attached. The transcript is available for review in the Clerk's Office. Please contact the court reporter listed above for copies. (msd,) (Entered: 06/16/2006)
06/16/2006	49	TRANSCRIPT of Sentencing as to Deondery Lazar Chambers, II held on May 12, 2006 before Judge Gilbert. Court Reporter: Jane McCorkle. This is a text entry only - no document is attached. The transcript is available for review in the Clerk's Office. Please contact the court reporter listed above for copies. (msd,) (Entered: 06/16/2006)
		* * *

DATE	NO.	PROCEEDINGS
02/27/2007	57	MANDATE of USCA (certified copy) as to Deondery Lazar Chambers, II re 44 Notice of Appeal - Final Judgment affirming the judgment of the District Court. (bkl) (Entered: 02/27/2007)

* * *

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2405

UNITED STATES OF AMERICA,
Plaintiff,

v.

DEONDERY L. CHAMBERS, II,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/17/06	Criminal case docketed. [06-2405] [1987320-1] Transcript information sheet due 5/30/06. Appellant's brief due 6/26/06 for Deondery L. Chambers. (kell)
	* * *
7/10/06	Filed 15c appellant's brief by Deondery L. Chambers, per order. Electronically Transmitted. [06-2405] [0-0] (leti)
	* * *
8/7/06	Filed 15c appellee's brief by USA. Disk filed. Electronically Transmitted. [06-2405] [0-0] (scze)
8/16/06	Filed 15c appellant's reply brief by Deondery L. Chambers. Electronically Transmitted. [06-2405] [0-0] (leti)
	* * *

DATE	PROCEEDINGS
11/1/06	Filed Appellee USA Citation of Additional Authority, per CR 28(e). [06-2405] [2041637-1] (scze)
	* * *
12/13/06	Case heard and taken under advisement by panel: Circuit Judge Richard A. Posner, Circuit Judge Daniel A. Manion, Circuit Judge Terence T. Evans. [06-2405] [2054827-1] (kare)
	* * *
1/9/07	Filed opinion of the court by Judge Posner. AFFIRMED. Circuit Judge Richard A. Posner, Circuit Judge Daniel A. Manion, Circuit Judge Terence T. Evans. [06-2405] [1987320-1] (hard)
1/9/07	ORDER: Final judgment filed per opinion opinion. With costs: n. [06-2405] [2062429-1] (hard)
1/22/07	Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellant Deondery L. Chambers. Dist. [06-2405] [2067288-1] (fern)
1/26/07	Sent clerk's copy of request to Appellee USA requesting 30c of their Answer to the Petition for Rehearing and Petition for Rehearing Enbanc filed by the appellant on 1/22/07. [06-2405] [2069130-1] Answer to Petition for Enbanc Rehearing due 2/9/07 for USA. (fern)

DATE	PROCEEDINGS
2/12/07	Filed 30c Answer of Appellee USA to Petition for Rehearing and Petition for Rehearing Enbanc. Dist. [06-2405] [2074209-1] (fern)
2/16/07	ORDER: Appellant Deondery L. Chambers Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [06-2405] [2067288-1] (fern)
2/26/07	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 1 vol. pleadings; 2 vol. transcripts; 1 vol. exhibits; 1 env. in camera.) [06-2405] [1987320-1] (cove)
	* * *
4/25/08	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari and GRANTING motion for leave to proceed on appeal in forma pauperis. Supreme Court Case No.: 06-11206. [06-2405] [2210897-1] (alys)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[Filed 07/06/2005]

Criminal No. 05-40044-JLF

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEONDERY LAZAR CHAMBERS, II,
a/k/a Deondery L. Chambers,
Defendant.

INDICTMENT

THE GRAND JURY CHARGES:

On or about May 31, 2005, in Jefferson County, within the Southern District of Illinois,

DEONDERY LAZAR CHAMBERS, II,
a/k/a Deondery L. Chambers,

defendant herein, who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, a felony under the laws of the State of Illinois, on or about July 15, 1998, to wit: Robbery and Aggravated Battery, in the Circuit Court for the Second Judicial Circuit, Jefferson County, Illinois, Case No. 98-CF-109, did knowingly possess in and affecting interstate commerce a firearm, that is: a Smith and Wesson, Model 66, .357 Magnum caliber revolver, serial number 9K6476, all in violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 924(e).

A TRUE BILL:

/s/ John Dantel
FOREPERSON

/s/ Ronald J. Tenpas
RONALD J. TENPAS
United States Attorney

/s/ George A. Norwood
GEORGE A. NORWOOD
Assistant United States Attorney

Recommended Bond: Detention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[Filed 07/29/2005]

Criminal No. 05-40044-JLF

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEONDERY LAZAR CHAMBERS, II,
a/k/a Deondery L. Chambers
Defendant.

INFORMATION CHARGING PRIOR OFFENSES

Comes now the United States of America, by and through its attorneys, Ronald J. Tenpas, United States Attorney for the Southern District of Illinois, and George A. Norwood, Assistant United States Attorney, pursuant to Section 924(e)(1) of Title 18, United States Code, and informs the Court that the government believes that the defendant qualifies as an armed career criminal within the meaning of Section 924(e)(1), stating as follows:

1. That the defendant has been charged in the indictment with a violation of Title 18, United States Code, Section 922(g)(1).

2. That on July 15, 1998, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Robbery and Aggravated Battery in Case No. 98-CF-109.

3. That on February 24, 1999, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Escape in Case No. 99-CF-47.

4. That on June 30, 1999, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Unlawful Delivery of a Controlled Substance within 1000 feet of Public Housing in Case No. 99-CF-157.

WHEREFORE, the United States of America hereby files this Information Charging Prior Offenses to subject the defendant to the enhanced provisions of Title 18, United States Code, Section 924(c)(1) upon his conviction under the Indictment.

/s/ George A. Norwood
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CR No. 05-40044-JLF

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEONDERY LAZAR CHAMBERS, II,
a/k/a Deondery L. Chambers,
Defendant.

ORDER OF DETENTION

FRAZIER, Magistrate Judge:

Defendant appeared with counsel at a detention hearing on August 1, 2005. He is indicted as a felon in possession of a firearm.

There is a possibility that defendant faces a life sentence as an armed career criminal. In any event, his extensive criminal history precludes bond. There is a serious risk that he would either flee or pose a threat to a witness against him in the underlying offense. There is very strong evidence to believe that during an argument he obtained a firearm owned by him and fired it in the air to make an impression on the person with whom he was arguing. No condition or combination of conditions attending pretrial release could sufficiently alter judgment to prevent this from recurring. Detention is GRANTED.

IT IS, THEREFORE, ORDERED THAT:

1. The defendant shall be COMMITTED to the custody of the Attorney General of the United

States for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

2. The defendant shall be AFFORDED reasonable opportunity for private consultation with his attorney or any person hired by his attorney for the purpose of preparing a defense; and

3. On Order of a Court of the United States or on request of an attorney for the government, the person in charge of the corrections facility in which the defendant is confined shall DELIVER the defendant to a United States Marshal for the purpose of an appearance in connection with a court proceeding.

DATED: August 1, 2005.

/s/ Philip M. Frazier
PHILIP M. FRAZIER
United States Magistrate Judge

[1]IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 05-CR-40044

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEONDERY LAZAR CHAMBERS,
Defendant.

REPORT OF PROCEEDINGS

Sentencing Hearing

BE IT REMEMBERED AND CERTIFIED that heretofore on May 12, 2006, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, Honorable G. Patrick Murphy presiding, the following proceedings were had in open court in Benton, Illinois, to-wit:

APPEARANCES

Mr. George Norwood
Asst. U.S. Attorney — For the Plaintiff

Mr. Phillip J. Kavanaugh
Federal Public Defender — For the Defendant

JANE McCORKLE
Official Court Reporter
U.S. District Court
301 W. Main Street
Benton, Illinois 62812

[2] INDEX

WITNESSES FOR THE GOVERNMENT	DIRECT	CROSS	REDIRECT	RECROSS
Kevin. Jackson	37			
WITNESSES FOR THE DEFENSE:				
Deondery Chambers	12	22	33	
Brenda Tripp	35	36		

EXHIBITS:	MARKED	RECEIVED
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[3] THE CLERK: Court calls United States of America versus Deondery Lazar Chambers, case number 05-40044. Are the parties ready?

MR. NORWOOD: The government is present by George Norwood, Assistant U.S. Attorney. We are ready to proceed.

MR. KAVANAUGH: The defendant, Deondery Chambers, is present with his counsel, Phil Kavanaugh. We are ready to proceed.

THE COURT: Let the record show that counsel are present. Mr. Chambers is here with Mr. Kavanaugh, and Mr. Norwood is here, also.

Now the matter is set for sentencing this morning. And in the ordinary course of business, the Probation Department prepared the usual detailed written Presentence Investigation Report. There were objections filed. There was an addendum to the Presentence Investigation Report. I think that's been provided to both sides.

Now, we will get to the objections that are going to require a factual, some factual findings, but as I understand the case, here is where we are. First of all, if the defendant qualifies as a career offender with his Criminal History Category of VI and giving him the three points for cooperation that he would be entitled to, he Comes out as a 31. And that seems to the Court, and I stand here to be corrected, but if that's the case, then the other [4] objections really don't amount to anything because in that event, I think he has a base offense level of 24.

The Probation Department and the government have him for an additional four points on top of that because of the aggravated use of a firearm and then

another two points on top of that for reckless endangerment, which would bring him up to a 30. And then he would get his three points off, which would bring him down to a 27.

So it seems to the Court that the most important matter would be to determine, first, whether he is a career offender. Mr. Norwood, have I stated this correctly?

MR. NORWOOD: The government believes so. If he is an armed career criminal, there will be a minimum sentence of 15 years and a maximum sentence of life. If there is not there will be a maximum sentence of 10 years under the felon in possession statute. So I think you're correct with respect that would be dispositive of the legal argument. It would be dispositive of most of the issues. I'm not sure. I believe the defendant will appeal.

THE COURT: Well, I'm still going to make the conditional finding. There's no question about that. I'm not going to leave anything undone.

MR. NORWOOD: Okay.

THE COURT: But that would be the first issue for the Court.

[5] MR. NORWOOD: Then I agree with the Court, Judge.

THE COURT: Mr. Kavanaugh.

MR. KAVANAUGH: There is a slight distinction. In that if the Court finds the defendant used or possessed the firearm in connection with a crime of violence, then the armed career criminal base offense level would be 34 minus three for acceptance. If the Court finds that he didn't possess the firearm in connection with a crime of violence, then it would be 33. It's an

eight-month difference, Your Honor. If he's a 34 minus three, it's 188 as the low. If he's a 33 then it would be 180 as the low part, 180 to 210. Other than that the Court's correct in its observations.

THE COURT: All right. We will discuss that as need be, but the first question for the Court is you have the predicate offense for the career offender statute. Now your objection is a simple legal argument that the escape for which he was convicted does not qualify as a violent crime.

MR. KAVANAUGH: That's correct, Your Honor.

THE COURT: And while one might think that to be the case, if my memory doesn't fail me, we have the *Bryant* case by Judge Kanne who says that it is, and I believe there's at least one other case in the Seventh Circuit. Is that your understanding of the law?

MR. KAVANAUGH: That was the law until we've had *Shepard* and *Hagenow*. I believe that those two cases somewhat [6] alter—

THE COURT: Is that the Ninth Circuit case?

MR. KAVANAUGH: No, *Hagenow* is a Seventh Circuit case and *Shepard*, obviously, is a Supreme Court case.

THE COURT: Tell me about the Seventh Circuit case that you think changes it.

MR. KAVANAUGH: Well, *Hagenow* was decided on August the 31st of 2005. It stands for the proposition that when you have a generic crime like burglary or escape or something like that, the issue of whether or not the conduct, the offense conduct involves a potential risk of physical injury to another or has as an element the use or attempted use of threatened

physical force, the sentencing court is to look at the actual charging instrument itself to see what kind of generic conduct was charged in the state court.

In this case Mr. Chambers was convicted of escape, but the actual indictment charges him with failure to report for a periodic imprisonment. In other words, he was sentenced to weekends in jail, and he didn't show up for three of them. On the face of the charging document itself, it's pretty clear that there is no violence, no attempted violence, no suggestion of violence. He just didn't come to report to jail for three weekends.

Ultimately, in that case he was charged with escape. He pled guilty to it. Was continued on probation [7] and they just gave him four additional weekends to serve subsequent to the plea on the escape charge. There was no indication in that at all that there was any violence involved.

There's another case that we've cited in the sentencing memorandum, and that's another Seventh Circuit case which was decided on December the 19th, 2005, *United States versus Sperberg*, S-P-E-R-B-E-R-G, and that discusses this issue, also. And it says on page 2 of the printout—I don't have the exact page number, but it says, "When a law specifies multiple ways to commit an offense, one within the scope of a recidivism enhancement and the other not, the federal court may examine the charging papers and plea colloquy to determine which variety of offense the conviction reflects." to see whether or not in this case this type of escape is violent.

It's pretty clear from the record in state court, Your Honor, that all he did was just didn't show up on time for three weekends.

THE COURT: And you have the indictment there?

MR. KAVANAUGH: Yes, sir.

THE COURT: And what does the indictment provide?

MR. KAVANAUGH: It, basically, charges a violation of—let's see. First, is a violation of 730 ILCS 5/3-6-4, which basically penalizes a person for failure to return from [8] furlough or work release.

THE COURT: All right.

MR. KAVANAUGH: Here's a copy of the statute.

THE COURT: You will provide that to my clerk.

MR. KAVANAUGH: I do have the indictment. I left it across the street.

THE COURT: For the moment I will take it as stated. I have no reason not to.

All right, Mr. Norwood. It doesn't sound like we have here what the escape cases talk about. The cases talk about because every escape involved a serious potential risk of physical injury to another, and what I have in mind is I'm trying to give a good example. But someone knocking the guard in the head and crawling over the fence at Marion and making a go for it, and it sounds like here the defendant just simply failed to report, which didn't involve any potential risk of physical injury.

MR. NORWOOD: Well, Your Honor, a couple things. First, the Seventh Circuit has rejected that argument years ago in the *Bryant* case.

THE COURT: That's Judge Kanne's case.

MR. NORWOOD: Yes, Your Honor. Where that very argument was raised by the defendant objecting to

the categorical approach of the Seventh Circuit. And all escapes, no matter if they're walk-away or failure to report [9] or the old hitting on the guard in-the-head escape, they are all crimes of violence.

I mean that's—I'll read from—I know the Court's read the *Bryant* opinion, but I mean *Bryant*—here's what the court said. "*Bryant* asks this Court to redefine our decision in *Franklin* by holding that not every crime of escape amounts to a crime of violence. He urges this Court to instead follow a fact-specific approach when determining if a particular crime of escape should be categorized as a crime of violence. Specifically, he argues that the type of escape for which he was charged—failure to return to a halfway house after being absent on a work release—is more appropriately thought of as failure to return than an escape. According to his reading the 'failure to return' to a halfway house after being absent without permission prevents so much less of a risk of violence that it must be considered different and distinct from a 'bust-out' or 'slither-away' type of escape."

The Seventh Circuit rejected this very argument.

THE COURT: And you say, too, that the more recent cases cited by the defendant simply do not trump *Bryant*.

MR. NORWOOD: Absolutely not. I could not find a published Seventh Circuit opinion involving escape, but I have found for the Seventh Circuit in the case, and it cites the case of *United States versus Lewis*, but the *Booker* [10] decision did not change this categorical approach to escape. *Booker* had to do with—

THE COURT: *Booker* has nothing to do with this.

MR. NORWOOD: Nothing has changed in the Seventh Circuit. Whether the Ninth Circuit in *Piccolo* considers it is one thing, but the Seventh Circuit has always considered escapes of any kind, walk-aways, failures to report or an escape or they are busting out of a prison all the same because of the risk of violence. And this Court knows what that risk of violence is, in any escape, is when the officers go to apprehend that person, they don't know why that person failed to report or walked away or escaped. They are risking their lives apprehending somebody who may not want to either report to prison or for whatever reason, and the Seventh Circuit has said it's a powder keg.

THE COURT: In short your response is that irrespective of the arguments, the Seventh Circuit still adheres to *Bryant*.

MR. NORWOOD: Absolutely.

THE COURT: Period.

MR. NORWOOD: Yes.

THE COURT: Now, we have certain other matters, too, and, of course, I will rule on all of these. The next is the objection to the four points.

Now, the Court understands that the defendant is a [11] passenger in a car driven by Ms. Marlowe, his girlfriend. Earlier there had been some trouble with Cortez Neal. I think I was informed he's died recently or committed suicide.

MR. NORWOOD: Yes, Your Honor, he committed suicide.

THE COURT: The late Mr. Neal, who is the brother of the mother of the defendant's two children. Do I have that right?

MR. KAVANAUGH: Yes, Your Honor.

THE COURT: And Shawnda, if I'm pronouncing that right.

MR. KAVANAUGH: Shawnda.

THE COURT: Shawnda. But at any rate there had been some problems, not surprisingly, and Mr. Neal had taken the side of his sister. Full-side ram. On the particular date we are concerned about, this defendant returns with a pistol. The pistol's loaded. That's enough to make him a felon in possession there. It does, as a matter of fact. Some words are exchanged with Cortez, and the defendant pulls out the weapon and fires it.

Then there is a chase. The police become aware of the chase. Marlowe drives the car that the defendant's in past the police car. The police car takes after it. And the defendant then ditches the firearm. The chase continues and the defendant's apprehended.

[12] Now, as I understand it, the theory in this case is that firing that firearm in a residential area is a felony under state law. Is that your theory?

MR. NORWOOD: Yes, Your Honor.

THE COURT: Mr. Norwood. And that being the case, he gets four points for that. And then on top of that, he gets another two points, not for obstruction of justice, but for reckless endangerment of a police officer. And I think the theory is there whenever there's a high speed chase particularly, well, that's reckless endangerment in this case.

So that's where we are. What do you want to put on in that regard, Mr. Kavanaugh?

MR. KAVANAUGH: I would like to call my client to the stand.

THE COURT: All right. The clerk will administer the oath to the defendant.

DEONDERY CHAMBERS, having been duly sworn, testified as follows:

THE CLERK: Please be seated. For the record state your name. Spell your last name.

THE WITNESS: Deondery C-H-A-M-B-E-R-S, Chambers.

DIRECT EXAMINATION

By MR. KAVANAUGH:

Q. Mr. Chambers, you don't deny that you possessed that [13] firearm on the day in question and shot it?

A. No, sir.

Q. Where did you point the barrel of the gun when you shot it?

A. In the air.

Q. Can you demonstrate for the Court exactly what you did?

A. I just shot up.

Q. Now, prior to this event, how would you describe your relationship with Cortez Neal?

A. Just bad.

Q. Bad?

A. Yes.

Q. Had he ever threatened you before?

A. Yes.

Q. How many times?

A. Probably like three times.

Q. And had you had problems the day before with Shawnda?

A. Yes.

Q. Briefly describe those for the Court.

A. I was at one of those parents' house, and we had been in her room, and there was a car pulled up in the driveway, and we didn't know who it was. And she went to the door. Ashley went to the door, and it was Shawnda at the door.

Q. What happened next?

A. She asked to open up the door and walked right in.

[14] Q. Did Shawnda engage you in a conversation, either you or Ashley?

A. Yes, me and her were arguing in the house. I told her, I just told her I was coming out of the house. It was Ashley's parents' house. Of course, they was asleep and I didn't want to cause no problems. I told her I wanted to leave the house. I was coming out of the house.

Q. Did anybody invite her in?

A. No.

Q. Was she welcome there?

A. No.

Q. This is Ashley's father's house, right?

A. Yes.

Q. This was in Mt. Vernon?

A. Yes.

Q. The next day you go back over to where Shawnda lives. That's at Conger and Sixth; is that right?

A. Yes.

Q. What did Cortez do towards you, and what did you see him do towards Ashley Marlowe, who is your girlfriend at the time?

A. At which time?

Q. Just begin from the first time you encountered Cortez that day.

A. I had come out of the house from changing clothes, and my [15] uncle told me to come outside because Cortez was out there chasing Ashley Marlowe around the car. So I come outside. And when I come outside, I get between both of them, and I ask Cortez what's going on. And he tell me that Ashley was disrespecting my kid, my son, my oldest son. So I asked my son — his name Deon, too — and I asked my son did Ashley say anything to him? He said, "No."

And I asked Ashley I was like, "Did you say anything to my son?" And she said, "No." I asked Cortez. I'm like, "Why are you, you know, just trying to start something?" Then I thought about it. It was just that he was trying to, he got in between me and Shawnda conflict from last night. That's what it was. "That's the reason he came looking for you."

Q. He was trying to pick a fight?

A. He was trying to pick a fight with me.

Q. Before Mr. Neal passed away, how big a man was he during this time?

A. Six-one.

Q. How much did he weigh?

A. About 200.

Q. Do you know his reputation in your community for his temperament for being a violent or a passive person?

A. He just act crazy.

Q. Okay. And I think — I believe he shot himself and [16] killed him earlier this year?

A. Yes, sir.

Q. Had you ever known him to carry a gun before?

A. Not to this point.

Q. Okay. So he's trying to pick a fight with you and Ashley. What do you guys do?

A. I — he was trying to reach for her, and I moved him to the side. Like "Man," you know what I'm saying, "quit tripping." Then he reached in his pocket and grab some money out of the pocket, and he slammed it on the hood, on the back trunk of my car. Told me that he had his buy money. That he was going to pistol whip me, and he was going to break her neck, snap her neck or something, something like that.

So he told me that I have like five seconds to move my cars or I wouldn't move at all. I didn't have a license at the time, but Ashley, she was scared to drive it. She was scared to get in the passenger seat. Every time she got in the passenger seat, he tried to grab her.

So I told her to move to the passenger side. I got in the driver's side and I drove off. And when I stopped like a block, I got out of the driver's side, and I told her to go in the driver's because I didn't want to get pulled over for driving.

Q. At some point in time you come back to this area of Lamar and Conger?

[17] A. Yes.

Q. And did you come back with a gun?

A. Yes, sir.

Q. When you got back to that area, what was the time frame? How long was it between the time you left after this fight and coming back with the gun?

A. Fifteen, 10 minutes — 10, 15 minutes.

Q. Okay. And when you come back, what happened?

A. I come back because I wanted to find Shawnda, to talk to Shawnda about why was her brother getting into an incident. And when I seen her, I seen her coming one way, and I was coming the other way so I was going to get behind her, but Cortez was in

back of her car. So when I pulled in back, pulled in back of Cortez.

So I told Ashley to go around so I could stop Shawnda. And at that time Shawnda had stopped and I had stopped, and I got out of the car, and Cortez was coming up toward me, so that's when I pulled out the gun.

Q. When you say coming up toward you, did he get in the car or get out of —

A. He was in the car at the time.

Q. And he got out of the car?

A. He start driving up towards me, and I didn't know if he had a gun or not. He just threatened me with it. You know what I'm saying. Said he was going to go get a gun.

[18] Q. And that's when you pulled the gun out and shot it in the air?

A. Yes.

Q. What happened next?

A. And then Shawnda got out of her car — Shawnda got out of her truck, and she started hollering, so I got back in the car. And Ashley — we drove off. When we drove off we come around the corner. Cortez started following behind me, and he started bumping — ramming into my car.

Q. Was he alone or with somebody else?

A. With a guy named Scoot.

Q. Whose car was he driving, his or Scoot's car?

A. Scoot's car.

Q. Okay. About how many times — Cortez was driving Scoot's car?

A. Yes.

Q. How many times did he ram Scoot's car?

A. When he got in the car and came around the corner, he rammed me the first time. It was a stop sign. He pushed me past the stop sign, and then we

tried to stop, but he rammed us again. By the time we got to Perkins, he rammed me again. He rammed me about six, seven times — six times.

Q. Did he ever knock you and Ashley off the road?

A. Yes.

Q. Where was that?

[19] A. At this gravel road. I can't remember. I think Liberty, it is. Liberty Road he knocked us. She got control back of the car and we kept going. Then we was going over the railroad tracks. He knocked us around the railroad tracks. That's when we come in contact with the police.

Q. What happened when you came into contact with the police car?

A. She went around us. Ashley, she went around the police car.

Q. And how long after that did you ditch the gun?

A. Probably about five, no less than about ten minutes into the chase.

Q. Okay. Now when you crossed the train tracks and you got rammed, was Cortez right behind you at that point?

A. Yes, at that point, he was.

Q. And you turned and that's when you encountered the police car; is that correct?

A. Yes.

Q. Where is Cortez and Scoot at this time?

A. When they rammed us over the tracks and we came to the police, I guess they must have backed up because they was still behind us at the time, but they must have come all the way around with us.

Q. At some point in time did you tell Ashley to pull over and calm down?

[20] A. Yes.

Q. About how long had you been going before that happened? How far — about how far had the police been chasing you all?

A. About five, six minutes.

Q. Okay. Were you, at this point in time, were you in town or were you out in the country?

A. We was out in the country.

Q. And once you pulled over, the police put you under arrest; is that right?

A. Yes, sir.

Q. Okay. And you see this statement that you signed the day you got arrested; is that correct?

A. Yes, sir.

Q. Is that pretty accurate? Is that pretty truthful?

A. Yes.

Q. Is there anything in there that you think is not accurate or truthful?

A. Its just the reason I told — I told — I said in my statement that I told her to keep going because I didn't want her to get in trouble. I mean that I didn't want her to get in trouble. I was going to take the blame for it, you know, so — but in her statement she already say that she had decided to keep going herself.

Q. Well, you were both scared?

A. Yes.

[21] Q. Okay. Now, one thing just to be clear. You've heard us talk about the escape charge?

A. Yes, sir.

Q. Was there any violent conduct by you involved in that?

MR. NORWOOD: Objection, Your Honor. This is a legal determination based on the documents, not on the actions or the facts underlying the case.

THE COURT: Well, at a minimum I will take it as an offer of proof so the record is complete.

Q. (by Mr. Kavanaugh) Tell the Judge what happened.

A. I was doing weekends in the county jail and I just — I didn't report for — I didn't report to do like three weekends and I went to court. I went to court one — after I missed three weekends and I had a warrant. I had a warrant for the week for not doing the weekends so they locked me up then. I went to court the next day. They reinstated my probation and gave me four more weekends added onto it and let me go home.

Q. And just briefly, Deondery, to make sure everything is clear, tell the Judge about your jaw, about your reconstructive surgery.

A. Like in, I think it was '94, I got — I was shot. I got shot. I was shot twice. I was shot two times. Both times I was an innocent bystander. I was in the wrong place at the time. The first time I got shot I was shot in the face. I [22] was in my house and some people shooting outside. And I'm from St. Louis. So people shooting outside of the house, and a bullet came through the next door neighbor's house. Came through their door, through their wall, came through my wall, came in my face and out through the wall.

Q. How many surgeries have you had?

A. Three.

Q. And what have you got in your face now?

A. I've got a metal plate from here to here.

MR. KAVANAUGH: Okay. Your Honor, would the record reflect he's talking about the entire left — right side of his jaw?

THE WITNESS: Here to here.

THE COURT: He's pointed out with his fingers where the plate is.

MR. KAVANAUGH: Okay. That's all the questions I have.

THE COURT: Any cross examination?

CROSS EXAMINATION

BY MR. NORWOOD:

Q. Mr. Chambers, so we don't have to go through every prior conviction, you've been convicted a number of times in the past?

A. Yes.

Q. Are the convictions in your presentence report accurate?

[23] A. Yes, sir.

Q. And I'm handing you what's been marked as Government Exhibit 1, and that's a copy of the written statement that you signed, correct?

A. Yes, sir.

Q. And to be fair you didn't write that out. The officer wrote it out?

A. Yes, sir.

Q. And you read it before you initialed it and signed it?

A. Yes, sir.

Q. And you told the officer the truth, right?

A. Yes.

Q. You didn't lie to him, did you?

A. I lied to him when I told him that I, that I told Ashley to keep driving the car.

Q. Well, you told the officer that several times, didn't you?

A. No, I only told him that one time.

Q. One time?

A. Yes.

Q. Okay. But you did lie to him then?

A. Yes.

Q. You're admitting that?

A. Yes, I did.

Q. Okay. Now let's talk a little bit about this incident [24] with Cortez Neal. Am I correct you said you didn't know that prior to that time, you never knew him to carry a gun; is that right?

A. Not at the time.

Q. Okay. So you had, and we are talking about the day in question that the incident occurred on and the chase occurred on, on that date you already had a gun somewhere, right?

A. I went and got a gun.

Q. Where did you get it from?

A. From my house.

Q. From your house. How long had you had the gun?

A. For a while.

Q. Well, are we talking a week, a month, a year? How long did you have the gun?

A. About a month.

Q. Okay. Was the gun loaded?

A. No, not at the time. I loaded the gun.

Q. Okay. So after the initial altercation with Cortez Neal, you and Ashley Marlowe left?

A. Yes.

Q. This is after he threatened, threatened to pistol whip you and snap your neck?

A. Yes.

Q. You all left the area, you and Ashley, correct?

A. Yes.

[25] Q. You weren't near Cortez Neal?

A. Yes, sir.

Q. You could have driven to the police department, couldn't you?

A. Yes.

Q. So you could have reported a crime, couldn't you?

A. Yes.

Q. You could have gone to the police and said, "This guy threatened to break my neck." Right?

A. Yes, sir.

Q. You didn't do that?

A. No, sir.

Q. You went to your house?

A. Yes, sir.

Q. You went and got a gun?

A. Yes, sir.

Q. You went and loaded a gun?

A. Yes, sir.

Q. And then you went back to where Cortez Neal was?

A. I didn't go back to where he was. The way to my kids' mother's house is the same route, around where all this happened at, so I was going to my kids' mother house to talk to her, but at the same time I ran — I seen her coming. I was coming to her house. She was coming towards my way. I was going to go catch up with her, but I didn't see Cortez [26] car because he was driving behind her in the car that he was in.

Q. So you went home and loaded the gun and drove back to talk to the mother of your babies?

A. I wasn't — it wasn't like I was going to have the gun out for her. I was going to ask her what was her brother because our family never gets in our problems. This is the first time this ever happened.

Q. So your intent was to go and talk to the mother of your children?

A. Yes, sir.

Q. And you went and got a loaded gun before you did that?

A. Yes, sir,

Q. And you went to — do you have a phone?

A. Huh?

Q. Did you or Ashley have a phone at that time?

A. Yes, sir.

Q. Did the mother of your children have a telephone where you could call her?

A. Yes, sir. No. Not at the time, no.

Q. So there's no way you could have called her on the phone?

A. No, she just got a phone since I've been locked up.

Q. So you went back to talk to her?

A. Yes.

Q. Where does she live in relation to Cortez Neal?

[27] A. Cortez at the time, he wasn't even living in Mt. Vernon. He was living in Carbondale. Shawnda stays in Mt. Vernon.

Q. Okay.

A. So he was just down there for some reason. I don't know.

Q. But according to your testimony, you came back 10 to 15 minutes after you left, right?

A. Yes.

Q. So when you left Cortez Neal was there, right? When you left the area —

A. When I left the area.

Q. — Cortez Neal was still there?

A. Yes, in front of the person house that I was changing clothes at. I wasn't changing clothes at Shawnda's house.

Q. Okay. Why did you go and get the gun for if you were going back to talk to the mother? Your intent is to go back to talk to the mother of your

children, and you go and get a loaded gun — and go get a gun and load it and take it back to talk to the mother of your children. Why did you do that?

A. Because I didn't — because I was just threatened by Cortez, and I didn't know if I was going to run back to him or not so I was just protecting myself in case he, you know —

Q. You knew it's illegal for you to have a gun, right?

A. Yes, sir.

Q. Why didn't you go to the police?

[28] A. That was a mistake I made.

Q. But why didn't you? I'm wondering.

A. I didn't. I just — I wasn't thinking.

Q. Okay. So you had the opportunity to go to the police, but you chose not to?

A. Yes.

Q. Now, you indicated that — now, where did these shots take place? How many shots were there?

A. One.

Q. Where did they take place at?

A. Lamar side, on the Lamar side of the —

Q. Housing projects?

A. Yes.

Q. Where people live?

A. Yes, sir.

Q. It's a residential area?

A. Yes, sir.

Q. Okay. And your testimony is you shot the gun straight up in the air?

A. Yes, sir.

Q. Okay. If you were scared for your life from Cortez Neal, why did you shoot it straight up in the air?

A. Because I wasn't trying to harm him. I just wanted him to back up off of us so we could just go.

Because at the time I couldn't talk to Shawnda. I couldn't talk to Shawnda [29] because he was there.

Q. If you had a dispute with Cortez Neal, why didn't you go and just take care of it man-to-man in the old-fashioned way and fight him?

A. Because I been shot in the face. If I get hit in the face, I could be hurt real bad.

Q. So you don't fight anymore?

A. If it really comes down to it, I have to, yes.

Q. You've fought before?

A. I try to avoid it. I try to avoid any altercation if I can. If I don't have any choice, then, I guess I have to fight, I guess.

Q. When you were in IDOC, you were in segregation because of your fighting, correct?

A. Yes.

Q. Okay. So when push comes to shove, you can fight. You don't need a gun, do you?

A. No, sir. At the same time it wasn't — when I was in IDOC, I wasn't in an altercation with a person as big as Cortez.

Q. Oh, so if the person is the same size as you or smaller, you can fight them, but if they are bigger than you, you got to get a gun?

A. No. No. No.

Q. Okay. You indicated that Cortez Neal was ramming your [30] car?

A. Yes, sir.

Q. How many times did he ram it?

A. Six or seven times.

Q. Where did he ram your car?

A. Coming around — right when you come around.

Q. I mean not where geographically. Where on the car did he hit you?

A. In the back,

Q. How many times?

A. Like six or seven times.

Q. Always in the back?

A. Always in the back.

Q. Was it with a lot of force?

A. Yes, because we stopped — we try to stop him when he bump me the first time. We try to stop. He pushed me past the stop sign right in the intersection. If any cars would have came, we probably would have got hit. He pushed me right in the middle of the street.

Q. So he pushed you so hard he pushed your car in the middle of the street?

A. Yes, sir.

Q. So there must have been a lot of damage to your car. If he pushed your car so hard it went into the intersection, would there be damage to your car, do you think?

[31] A. There should have been. I don't think any damage was done to it.

Q. Okay. Now you're fleeing and Ashley's driving, and you're in the passenger's seat, right?

A. Yes.

Q. And you're telling her to stop?

A. Not at the moment, not at the time.

Q. Then you come upon a police car in the street, correct?

A. Yes.

Q. And the police car has its lights on and sirens going, right?

A. Yes.

Q. And Cortez Neal isn't behind you at this point, correct?

A. We thought he was still behind us, but he must have had it turned around somewhere once he pushed us across the track because once we came

over the tracks, when you come across the tracks, you make a left. And as soon as you make that left, that's when we ran into the police at. We thought — we thought he was still behind us, but evidently, he wasn't because the police didn't go after them.

Q. You just made a left turn when you come around?

A. When we came around, yes.

Q. So you're going slow when you made a turn?

A. After we came around over the tracks, he pushed us.

Q. Okay.

[32] A. So we kind of, you know —

Q. But you saw the police car, right?

A. Yes.

Q. And if this person is threatening you like you say, you could have stopped right there where the police officer was, correct?

A. Yes, but we was scared. She was scared, too. Ashley was scared, too.

Q. But the police officer is right there in the middle of the street, right?

A. Yes.

Q. You could have stopped?

A. Yes.

Q. You could have told the police officer "These guys are chasing me," right?

A. Uh hum.

Q. But you still had the gun, didn't you?

A. Yes.

Q. So you couldn't stop, right?

A. Yes.

Q. Because you had the gun?

A. Yes.

Q. And you didn't want to be arrested for being a felon in possession?

A. Yes.

[33] Q. That's the reason you told her to keep going, correct?

A. Excuse me?

Q. That's the reason you told Ashley to keep going?

A. Yes. Yes.

MR. KAVANAUGH: Nothing further.

MR. NORWOOD: One question.

REDIRECT EXAMINATION

BY MR. KAVANAUGH:

Q. The night before this happened when Shawnda went into Ashley's parents' house and created a disturbance, did you go to the police?

A. Yes.

Q. What did they do?

A. Nothing. Asked some questions about me that don't even concern the incident.

Q. So you went to the police the night before?

A. Yes.

Q. You asked for their help?

A. Yes.

Q. They didn't do anything?

A. They was just ready to lock me up because I kept complaining about it. No, they was ready to lock me up. Told me to leave. They was going to handle it, but they wasn't doing nothing about it.

MR. NORWOOD: Okay. That's all the questions I [34] have. Your Honor, I forgot to move to admit Government Exhibit 1 for the record.

MR. KAVANAUGH: It's already in in my submission. I put in his statement, Ashley Marlowe's statement, and a statement by two by-standers.

THE COURT: I have his statement. It will be made as part of the record.

MR. KAVANAUGH: I will make an offer of proof. We have Mr. Ronald Jackson who saw the altercation on Conger Street, and he would testify consistent with what Mr. Chambers has already testified to about the fight and the threats and everything like that. I'll just, if you want to hear from him, I can put him on.

THE COURT: Does the government accept the proffer?

MR. NORWOOD: I'm trying to find out a little bit more information about this individual.

MR. KAVANAUGH: Lionel Jackson. He has a felony conviction. He's been to the Illinois Department of Corrections. I will put that on the record, also.

THE COURT: All right, I want to see if the government will accept the proffer.

MR. NORWOOD: That's fine, Your Honor.

THE COURT: All right. I'll take the proffer.

MR. KAVANAUGH: We have one final witness.

THE COURT: All right. Call your next witness.

[35] *BRENDA TRIPP*,

having been duly sworn, testified as follows:

THE CLERK; Please be seated. For the record state your name and spell your last name.

THE WITNESS: My name is Brenda Tripp, T-R-I-P-P.

DIRECT EXAMINATION

BY MR. KAVANAUGH:

Q. Where do you work?

A. I work at the office of the Federal Public Defender for the Southern District of Illinois.

Q. What do you do?

A. I'm an investigator.

Q. And did you do some work for me in relation to this Chambers matter?

A. Yes, sir, I did.

Q. Specifically, did you track down Mr. Chambers' car?

A. I did.

Q. Where did you find it?

A. I found it from in the front yard of Shawnda Neal's residence in Mt. Vernon.

Q. Did you take a look at the car?

A. Yes, sir, I did.

Q. Did you see any evidence of damage to the rear or the rear quarter panels?

A. No, sir, I didn't.

[36] Q. Did you see any — whether or not it was caved in or there was any paint or scratches to the rear or rear quarter panels?

A. Not that I recall.

MR. KAVANAUGH: That's all the questions I have.

THE COURT: Cross examination?

MR. NORWOOD: No, Your Honor.

THE COURT: You may step down.

MR. NORWOOD: One question.

CROSS EXAMINATION

BY MR. NORWOOD:

Q. When did you go see the car?
A. I was there Monday, May 8th.

MR. NORWOOD: Okay. Nothing further.

THE COURT: You may step down, Ms. Tripp. Good to see you.

THE WITNESS: You, too, sir.

MR. KAVANAUGH: Your Honor, that's all we have.

THE COURT: Very well. All right. The government's put the matter at issue. I've heard evidence including cross examination. I'll have a very brief argument on the issue of the objections.

MR. NORWOOD: Your Honor, the government has some evidence.

THE COURT: You have some evidence you wish to put [37] on? Pardon me. That never occurred to me.

MR. NORWOOD: First, the government will call Kevin Jackson.

THE COURT: All right. *KEVIN JACKSON*,

having been duly sworn, testified as follows:

THE CLERK: Please be seated. For the record state your name and spell your last name.

THE WITNESS: Kevin Jackson, J-A-C-K-S-O-N.

DIRECT EXAMINATION

BY MR. NORWOOD:

Q. And who do you work for, officer Jackson?
A. The Mt. Vernon Police Department.

Q. And how long have you worked for them?

A. Approximately two and a half years.

Q. I want to direct your attention — one second, Your Honor. I want to direct your attention to May 31st, 2005, at approximately 8:10 p.m. Were you working that night?

A. Yes, sir.

Q. Or that evening?

A. Yes, sir.

Q. Okay. And were you involved in a car chase?

A. Yes, sir.

Q. And does your car have a dashboard camera on it?

A. Yes, it does.

[38] Q. And did your camera there have a videotape of that chase?

A. Yes, it did.

Q. And I'll hand you what's been marked as Government Exhibit 2

MR. KAVANAUGH: I'll stipulate to the foundation.

MR. NORWOOD: And the government would move to admit Government Exhibit 2.

THE COURT: Moved by stipulation.

Q. (by Mr. Norwood) And you gave this to me this morning?

A. That's correct.

Q. I can play the tape.

(Playing the videotape.)

Q. (by Mr. Kavanaugh) Can you describe sort of what's happening? When the tape starts what's the scene so the Court knows how to follow it?

A. I was dispatched to the area of Sixth and Lamar for shots fired. While responding there I seen

the suspect's vehicle at the edge of town. I blocked off one road, and that's whenever the vehicle passed me, and then it continues from there.

Q. So when the tape starts it's when the vehicle is passing around you?

A. Yes.

Q. And you follow to chase it?

A. That's correct.

[39] Q. What speeds do you reach?

A. Speeds up to 80 miles per hour.

Q. Okay. Now this isn't part of the incident we are talking about today, is it?

A. No, it's actually —

Q. Now this isn't part of it either?

A. No, sir, it's not. It's just after this one.

Q. Just after this?

A. Yes. This is it.

THE COURT: There we go.

Q. (by Mr. Norwood) Now is this you turning around?

A. Yes, it is.

Q Now is this a residential area you are driving through?

A. Yes, sir, it is.

Q. And is that the car up in front of you that you're chasing?

A. Yes, sir, it is.

Q. Did you have to swerve to miss a dog?

A. Yes, I did,

Q. For the record that's traffic coming the other way, a vehicle coming the other way?

A. That's correct.

Q. Are your lights going at this point?

A. Lights and sirens.

Q. Okay. When you were first in the intersection, were your [40] lights and sirens on?

A. Yes, sir.

Q. And is that the defendant?

A. Yes, sir, it is.

Q. Getting out of the passenger's side?

A. Yes.

Q. Is that Ashley Marlowe getting out of the driver's side?

A. Yes, sir, it is.

Q. And what's the defendant saying to you at this time? Do you recall what he was saying to you?

A. I believe he was concerned about my pistol being pointed at him. Requesting I stop.

Q. And did you take him into custody after this?

A. Yes, we did.

MR. NORWOOD: Unless defense counsel wants to see more.

MR. KAVANAUGH: No.

Q. (by Mr. Norwood) And did you arrest both the defendant and Ashley Marlowe?

A. Yes.

Q. Were they both arrested?

A. They were both arrested and incarcerated.

MR. NORWOOD: Nothing further.

THE COURT: Cross examination.

MR. KAVANAUGH: Your Honor, we have never seen that [41] tape till right now. Could I have just a second to talk to my client?

THE COURT: Yes.

MR. KAVANAUGH: I don't have any questions.

THE COURT: All right. You may step down, Mr. Jackson.

MR. NORWOOD: And, Your Honor, one brief witness. I'm not sure it would be necessary. Detective Reickert. These are pictures of the vehicle. If you'll stipulate — I mean I can do an offer of proof. That was the vehicle immediately after.

MR. KAVANAUGH: At the impound.

MR. NORWOOD: Yes.

MR. KAVANAUGH: Yes. We stipulate.

THE COURT: The parties have stipulated that the photos being offered now are true and accurate depictions of the automobile as driven by the defendant as the automobile existed immediately after the chase and is impounded.

MR. KAVANAUGH: These are of the car driven by Ashley Marlowe.

THE COURT: Did I say driven by the defendant?

MR: NORWOOD: Yes.

THE COURT: The defendant was driven by the passenger. Anything else?

MR. NORWOOD: No.

[42] MR. KAVANAUGH: The issues in mitigation are somewhat defined by portions of the advisory guidelines, particularly, K2.10, which is the victim's conduct policy statement, and K2.12, which talks about duress. And specifically states that even though a duress justification might not constitute a complete defense to the crime charged, the Court can consider the duress issues in applying the guidelines

at both in determining the appropriateness of any enhancements as well as the advisory range.

It's our contention, your Honor, that shooting the firearm into the air was occasioned in pertinent part by the conduct of Cortez Neal who, by my count, if you just look at the statements of the parties, committed a number of felonies at the same time my client committed a crime for which he's already pled guilty. I would also call the Court's attention to the fact that admittedly there was a high speed pursuit, but the pursuit did not begin until after the car driven by Marlowe with my client with him was out in a more rural area. And that attenuates the risk of serious bodily injury to any person.

And as you can see, Ashley Marlowe drove the car, although fast, in a safe and appropriate manner. There was no suggestion in that tape that anybody came close to being hurt or put in actual risk of serious harm. So I would ask the Court to consider that.

[43] The law on the issue of reckless discharge of a firearm in the state of Illinois talks in terms of a mental state of recklessness which is in deference to what might happen by discharging a firearm. And in this case, Your Honor, the defendant argues that the conduct in question, the mental state was to avoid violence, was to avoid an altercation, and he did not intend to hurt anybody.

And, in fact, as the exhibits provided by the defense show, that although on one side of the street there was a residential neighborhood, on the other side of the street there was an open field. I don't know of any evidence that any person was actually put at risk by shooting this weapon in the air.

THE COURT: Thank you. I understand your argument.

MR. NORWOOD: Your Honor, the — with respect to the reckless discharge, I believe the Illinois Supreme Court case speaks for itself. Shooting a firearm in a residential area, which we have here, constitutes reckless discharge of a firearm, which is a Class 4 felony.

With respect to the reckless endangerment during flight, Your Honor has seen the videotape of the chase. It may have started in a residential area. It may have ended in a rural area. But even in that rural road, the officer had to swerve to miss an animal, and there was at least one oncoming car into the direction of the chase.

[44] To say she drove safely at speeds of 80 miles an hour during a chase is sort of an oxymoron. She recklessly endangered everybody, but did so in a safe manner. The government believes the video speaks for itself.

With respect to the issue of duress, two things. One, its not applicable under the law. The Seventh Circuit, and this is *United States versus Perez*, 86 F.3d 735, Judge Posner says, basically, about a felon in possession possessing a firearm for a defense. If ex-felons who feel endangered can carry guns, felon-in-possession laws will be dead letters. Upon release from prison most felons return to their accustomed haunts. Even those who go straight will in all likelihood continue to live in dangerous neighborhoods and consort with dangerous people. Every drug dealer has a well-written — he's not a drug dealer, I understand, but if we say ex-felons who possess a

firearm if you feel endangered, the law will be non-existent.

And finally, the elements for an offense version, one of the elements, no reasonable opportunity to avoid the threat of harm. This defendant left the threatened harm, went and got a gun, went and loaded a gun, returned to the threatened harm, and he bolted with the gun, fired the gun in the air in a residential area. There's no defense of duress or any mitigation of duress or anything like that.

MR. KAVANAUGH: Your Honor, I just want to be [45] clear. I'm relying on the guideline commentary and not the offense of duress. I realize that's not applicable here.

THE COURT: The Court has heard the evidence, covering all the papers including the briefs, and I note the following: First, the *Bryant* case by Judge Kanne is still the law in the Seventh Circuit. There Judge Kanne explicitly rejected an argument that is, in all respects, the same as the argument made here, the holding of that case being so explicit this Court would not rule inconsistently with that decision unless it were explicitly clear that it had been overruled and it has not.

The reason stated in that opinion, the Seventh Circuit simply, and for reasons of simplicity, categorically holds that escape is escape. And we're not going to get into the nuances of it for purposes of the sentencing statute. It counts. So we have here what is a career offender under the statute.

Now the other matters are going to be ruled on, too, so the record is clear.

Now, with regard to the four points, the Court will overrule the defendant's objection and will adopt the probation officer's recommended findings of fact there, and for this reason set aside for the moment the fact that the defendant was a felon in possession. And I use those words [46] advisory for the moment because what Judge Posner said in the case cited absolutely has to be the case. It's very dangerous to live in some quarters when you can't arm yourself, but that's an argument for not getting in trouble in the first place.

Set that aside for the moment. The standard is recklessness under the statute, not intent. I don't think the defendant intended to either kill or harm Cortez. I think that he wanted to frighten him. It didn't work as we now know, but to fire a weapon in no particular area, in a residential area, is reckless. What goes up, must come down. And where it comes down, nobody knows.

And it could be anybody that happened to have the misfortune of being in the residential area at the time. That's recklessness. It's not attempted homicide. It's not a lot of other things, but it is reckless and that's a felony. He recklessly discharged the firearm, so that counts.

Now, two, or the next point. Insofar as the two points that the probation officer assigned for the reckless endangerment, the probation officer was exactly right on that. Now, I understand that, first of all, that the defendant was not driving the vehicle, but still he was the prime mover.

There was a chase in the first instance because of [47] the actions of the defendant. The second thing is the defendant told us initially before he had time to

think about it that he told the officer that he instructed her to run and she did. That makes sense because he wanted to get rid of the firearm that he was carrying. He knew he was in serious trouble by this time. I might add on cross examination the last question the prosecutor asked, was that the reason you told her to run, and she said he said yes.

Now, there's more to it than that, though. Is there reckless endangerment whether he's driving or not? And the answer, yes, there is. It's true enough this is a rural road, but look, if Richard Petty were driving a car on the country road at 80 miles an hour, he's in risk and all of the rest of us are. He just is.

If you spent most of your life out in the country like at least two of us in this room, you understand full well the danger of driving fast on a country road. It's just dangerous. And I'm happy that the defendant and Ms. Marlowe were not injured in this situation. I'm particularly happy that the officer wasn't injured. And I'm particularly happy that grandma wasn't driving with a car full of kids from the other direction, and she wasn't injured either. But that's not the test. The test is whether there is reckless endangerment. Sure, there was. The defendant's objection is overruled.

[48] Again, I adopt all of the probation officer's recommended findings of facts and conclusions. And as I get it we have a career offender who, with a Criminal History Category of VI, who gets three points knocked off because of his cooperation, and he's down to a 31.

Now, what is your recommendation on this case, Mr. Norwood?

MR. NORWOOD: Your Honor, I don't mean to correct the Court at all.

THE COURT: Well, if I need correcting, please do it. I'd rather get corrected here than up the road.

MR. NORWOOD: You're referring to the defendant as a career offender, armed career —

THE COURT: Armed career — is it criminal or offender?

MR. NORWOOD: It's armed career criminal, ACC.

THE COURT: All right.

MR. NORWOOD: I didn't want there to be —

THE COURT: I appreciate that if my nomenclature is not correct. Did I calculate that right?

MR. NORWOOD: No, I think your calculations are correct.

THE COURT: Good. Good.

MR. NORWOOD: The sentencing range is 188 to 235 months. The government believes that a sentence in the [49] middle or higher end of the range is adequate in this case. You don't get to become an armed career criminal by happenstance. You have to actually work at it.

This defendant, beginning at age 18, had his first drug felony conviction as well as a DUI. What's troubling, very troubling is in 1998 the robbery conviction. This defendant testified, I believe the presentence report indicates, that he was shot twice when he was age 16, age 16 or 17 or 15, somewhere around there, shot in the jaw and shot in the chest. And he testified that he doesn't like to fight, especially individuals bigger than himself.

While the robbery took place, in paragraph 35 in the Presentence Investigation Report, took place after he had been shot when he and three other men beat and attacked a woman by the name of Brenda Anderson. She was beaten about the head and body with feet and fists.

Count 3, to which this defendant pleaded guilty to, was the offense of aggravated battery in that he knowingly caused harm to Brenda Anderson by kicking her in the body with his foot. So this defendant is, although he's been shot and it's unfortunate, he does not want to fight men, but to go with three other men and beat up a woman to take $75 is unconscionable. It's just unconscionable.

Nothing has caught this defendant's attention from age 18 forward. And the facts in this case — what really [50] happened is a function of human nature. Mr. Cortez Neal probably disrespected this defendant, and this defendant got mad, went and got a gun, went and loaded the gun and came back to confront Cortez Neal now that he had the gun. Now he was ready to fight. Even though he believed Cortez Neal never possessed a gun, this defendant got one loaded, and now he's ready to fight.

And the defendant says the shot went straight up in the air. I question how straight up into the air that shot went, but it was sufficient to scare Cortez Neal. The defendant talks about Cortez Neal ramming his car six times during the chase with enough force to push him through the intersection. The Court has the pictures of the car. There is not one iota of damage to that car.

This defendant has done nothing his entire life but break the law. This defendant — I tried to find

something. It's never been provided. He dropped out of school. You know, what are we to do?

I would advise the Court that this defendant did provide some information about a matter to me, and that's why I'm not reaching the entire top end, but the government would recommend a sentence at the middle of the range.

THE COURT: Mr. Kavanaugh, what is your recommendation?

MR. KAVANAUGH: Your Honor, I ask the Court to [51] consider the mitigating factors I've already put before the Court and the record. I would also advise the Court that Mr. Chambers did give a proffer that was accepted by the government that was considered complete, truthful, and successful. He also was forthright in dealing with the police.

He gave a statement. He admitted his culpability. He walked in. He pled guilty. He understood the thrust of arguments here today. I would suggest to the Court that he is not an awful human being as Mr. Norwood paints him, and I would suggest that the simple record of his incarceration from Jefferson County would indicate to that.

It appears neither the state's attorney of Jefferson County nor the presiding judges in the cases thought he was that horrible of an individual because he was not incarcerated for more than about a year and a half total based upon this entire criminal record. So I think Mr. Norwood paints an exaggerated picture of his criminality. That would be my recommendation.

I would also ask to supplement the record, bring over a copy of the criminal information on the escape conviction that is at issue. I've got it across the street.

I will bring it over. I'll mark it as Defendant's Exhibit 6. I will bring it over in about ten minutes right after lunch.

THE COURT: The Court will allow you to make that [52] part of the record, to bring that to the attention of my deputy clerk, Vicki McGuire.

All right. Mr. Chambers, this is your opportunity to speak if you would like. You are not required to. It will not be held against you if you do not, but the Court is always happy to hear from you. It's a valuable right. Is there anything you'd like to say? Mr. Chambers, then you may speak. Just speak into the mike so I can hear you.

THE DEFENDANT: Man, I accept the things I did, you know. I'm not denying. I'm not denying that I shouldn't have had the gun and none of that. I shouldn't have had it, you know.

THE COURT: All right.

THE DEFENDANT: Man, I got two kids I got to get home to.

THE COURT: Uh hum.

THE DEFENDANT: You know, I know I should have thought about that before I did what I did, but I'm not a violent person, you know. I've been in prison once, you know. I've been out three years. I haven't caught a felony in three years. Haven't been in trouble in three years. You know, this is the only thing I done in three years.

I know it's not that simple, but, you know, I got — man, I've got my kids now. I've got my little brother right there, you know. Only thing I don't think I deserve. [53] It's not like I'm a violent person that can't be fixed or something.

I've been on my own, man. I've been on my own since I was like 14, 15. I don't really got nobody. That's all I got right there.

THE COURT: All right. The Court's prepared to pronounce sentence. I've considered the defendant. Some of what he, said most of it, is true. The defendant grew up in St. Louis, Missouri. He certainly has not had much guidance and assistance since he came into this world, but here we are. And the conviction simply speaks for itself.

Now this Court, nor any other court, really is capable of looking into and ascertaining the soul of a man, and that's not to be under our jurisdiction, actually. That's a good thing, but we are and you should judge actions and try to put them into context.

And it is a shame. This defendant here has two children, and by nature's law the children need him like he needed somebody, but he will not be here to provide that. And all the concerns that are expressed here and heartfelt should have been considered at the time.

Now, look. Everyone here understands and this defendant did, too, that he was told, "You're a felon. You can't possess a firearm." And he did. And he compounded the problem by going for a firearm which he really didn't have [54] to. And then to make matters worse, he fired it. And here we are today. Now if my memory doesn't fail me, what are you, 26 years old, 27?

THE DEFENDANT: Twenty-six.

THE COURT: Twenty-six years old. And a better part of his life, the best part he's going to be locked up. Now, I think that this is a guideline sentence,

and while some courts would, and it can certainly be justified in imposing something at the high end, they would do it.

But here's my thinking on this subject. I'm going to give you a sentence at the very lowest end. And you will be committed for a term of 188 months. Here's my reasoning: That's a lot of time. And the statute itself provides that not sentence you to any more than is necessary.

Besides that, if you can't learn your lesson in 188 months, it wouldn't matter if I locked you up for 235 months because when you get out, you'll promptly, if you haven't learned your lesson, you will promptly violate your supervised release and just be picked up again and go back to prison, which is what generally happens in these cases.

So 188 months in the Bureau of Prisons to be followed by five years of supervised release. I'll talk about that a little bit more. You're going to have a special assessment of $100. There is no restitution involved in this case. There is a fine. Now the fine calls for something [55] between 15,000 to 150,000 with a statutory finding of $250,000. But there is no possible way on earth. Again, if my memory doesn't fail me, the lifetime reported earnings of this defendant are something like $20, so there's no reason to impose a fine that he could never even begin to pay or comprehend.

So I will do a downward departure, and it will be to $750. And that fine, as well as the special assessment, will be paid in an amount and in the manner specified by the financial responsibility officer in the particular prison he's incarcerated at, and they vary

from prison-to-prison. I don't know what it will be. So you have that.

Now, supervised release. I'm not going to go over every particular matter because it would be impossible for you to remember it, but you do need to know within 72 hours of being released, you must report in person to the nearest Probation Office in the district to which you are released.

And while on supervised release, you shall not commit another federal, state, or local crime. You will submit to drug testing. That will happen no more than 52 times a year. You shall not possess a firearm or other destructive device. You shall cooperate in the collection of DNA as directed by your probation officer.

While on supervised release, you will submit your person, your residence, your real property, your car, your [56] computer, and your vehicle to searches by probation officers whenever they determine and, as a matter of fact, it is reasonable to do so. You must inform your family members or friends or lovers who you're staying with or spouse that they, too, will be subject to this. That is to say, the probation officers will come back in and search even if it's their house. If this doesn't happen it will be revoked, that is, your supervised release will be revoked.

Now, just a few things that you need to know. If you request it, the clerk of my court will prepare and file for you today a notice of appeal. She will do that only if you request it. Do you want her to do that?

MR. KAVANAUGH: Your Honor, we probably will appeal, but we won't do it today. I will file the necessary paperwork next week.

THE COURT: Then in that case my clerk of court will not do that. I want that clear. In the event a notice of appeal is filed as anticipated, the clerk will then appoint a lawyer for purposes of the appeal at no expense to the defendant. And a record of this matter will be provided for purposes of the appeal at no expense to the defendant.

Mr. Norwood, is there, anything the Court has misstated or overlooked that you haven't already corrected me on?

MR. NORWOOD: No, Your Honor, the government would [57] make one request of the Court. The Exhibit No. 2, I believe, the videotape —

THE COURT: Yes.

MR. NORWOOD: — I received it this morning. It's the original and has not only the chase involving Ms. Marlowe —

THE COURT: Would you like to withdraw that and submit a copy?

MR. NORWOOD: And submit a copy of just that part of it. There are other matters on it that are just not relevant.

THE COURT: Granted, but don't be too tardy because Ms. McGuire is fast. She will have this record on appeal at no time as requested.

MR. NORWOOD: Thank you, Your Honor.

THE COURT: Is there anything I've overlooked?

MR. KAVANAUGH: The defendant objects to the rulings for the reasons stated. The defendant would like the Court to grant him a very short visit with the children before he is remanded to the custody of the Bureau of Prisons.

THE COURT: All right. I have no objection to that, but I will leave that to the sound discretion of the marshals. As you know we have a rule in my court they never try to advise me on sentencings, and I never advise them on [58] custody, but Rick, you use your judgment on that.

All right. There being nothing then further before the Court, the court stands in recess. The defendant is remanded to the custody of the marshals as they see fit under the circumstances.

(End of hearing.)

AO 187 (Rev. 7/87) Exhibit and Witness List

United States District Court

Southern DISTRICT OF Illinois

USA v. Deondery L. Chambers EXHIBIT AND WITNESS LIST

CASE NUMBER: 05-40044-001-JI

PRESIDING JUDGE	PLAINTIFF'S ATTORNEY	DEFENDANT'S ATTORNEY
G. Patrick Murphy	George Norwood	Phillip Rennaugh, AP
TRIAL DATE(S)	COURT REPORTER	COURTROOM DEPUTY
5-12-06 -	Jane McCarthy	Vicki McGuire

PLF. NO.	DEF. NO.	DATE OFFERED	MARKED	ADMITTED	DESCRIPTION OF EXHIBITS AND WITNESSES
Wit:		5/12/06			Deondery Chambers
1		5/12/06	✓	✓	Chambers written statement
Wit:		5/12/06			Brenda Tripp
Wit:		5/12/06			Kevin Jackson
2		5/12/06	✓	✓	Stipulation Video Tape
3-9		5/12/06	✓	✓	Photos Driven by passenger Marlowe
	6	5/12/06	✓	✓	State Record 99-CF-47

* Include a notation as to the location of any exhibit not held with the case file or not available because of size.

DEFENDANT'S EXHIBIT

RECORD SHEET

Cts I II & III Escape

99-CF-47
Case No.

Nature of Case

THE PEOPLE OF THE STATE OF ILLINOIS
-vs-
DESMONT L CRAWFORD

Attorneys:
States Attorney

Verbinas

Fine all 9-6 Appr Prelim Dispos. Sentence Given

DATE			JUDGE AND REPORTER		COSTS
1	17	99		Information filed. Bond set at $	$ 40.00
2	17	99		Certificate of Service filed	5.00
				Notice of Hearing filed.	5.00
2	19	99		Certificate of Service filed with Notice of Hearing	
2	24	99	Hawley Kathy L.	Def w/ PD Verbinas. ASA Villani. Cts II & III Dismissed on motion of Ct I:	
				☑ Defendant is advised of: ☑ Nature of the charge(s); ☑ Possible penalties, including enhanced or extended terms; ☑ Right to plead not guilty or persist in said plea; ☑ Plea of guilty as a waiver of trial and of right to remain silent, cross-examine witnesses, and present defense. ☑ Inquiry is made as to threats or promises affecting the plea ☑ Plea is found to be voluntary and knowing ☑ Factual basis for plea is presented ☐ Defendant confirms conversing _____; defendant sentenced to 2a Mill. Mittimus (Reinstated) + costs. ☑ Judgment of guilty is entered. ☑ Ordered sex OFF.	
				Rev. hrg set 4-4-99 @ 9 am (Time Cert)	
6	30	99	Hawley County J.	PTR filed. Def w/ PD Verbinas. ASA Villani. Cause to APR 8	
				☑ Defendant is advised of: ☑ Nature of the charge(s); ☑ Possible penalties, including enhanced or extended terms; ☑ Right to plead not guilty or persist in said plea; ☑ Plea of guilty as a waiver of trial and of right to remain silent, cross-examine witnesses, and present defense. ☑ Inquiry is made as to threats or promises affecting the plea ☑ Plea is found to be voluntary and knowing ☑ Factual basis for plea is presented ☐ Defendant confirms conversing _____; defendant sentenced as set forth below: ☑ Judgment of guilty is entered. ☑ Ordered sex OFF.	
				5 yrs DOC (CONCURRENT) + balance of previously imposed fines/costs.	
				☑ Rev hrg 7/14/2000 @ 9 AM.	
7	6	99		Statement of Costs filed	
8	4	99		Motion to Withdraw Guilty Plea filed	
1	12	00	Hawley	Set 725 CF-157. 4-4-00 9:30 am	

ADDITIONAL RECORD SHEET

Case No. _____ No. _____

Nature of Case _____

DATE	JUDGE AND REPORTER		COSTS
12/6/04	Kt / Cyndy	Motion filed 8.4.99 stricken Term 8/20/05 PG	

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
JEFFERSON COUNTY, STATE OF ILLINOIS

[Filed FEB 17, 1999]

No. 99-CF-47

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

DEONDERY L. CHAMBERS
902 Wescott Street
Mt. Vernon, IL 62864
M/B 07/07/79
C516-1727-9193
Defendant

INFORMATION-COUNT I

The State's Attorney of said County charges:

That on the below listed dates in 1998, in said County, DEONDERY L. CHAMBERS committed the offense of ESCAPE in that said defendant, having been convicted of unlawful possession of a controlled substance, 98-CF-17, in violation of 720 ILCS 570/402(c), a felony, knowingly failed to report November 27, 1998, December 4, 1998, December 11, 1998 and December 18, 1998, to the Jefferson County Jail, a penal institution, in violation of 720 ILCS 5/31-6(a), a class 3 felony.

COUNT II

The State's Attorney of said County charges:

That on the below listed dates in 1998, in said County, DEONDERY L. CHAMBERS committed the offense of ESCAPE in that said defendant, having been convicted of robbery, 98-CF-109, in violation of 720 ILCS 5/18-1, a felony, knowingly failed to report November 27, 1998, December 4, 1998, December 11, 1998 and December 18, 1998, to the Jefferson County Jail, a penal institution, in violation of 720 ILCS 5/31-6(a), a class 3 felony.

COUNT III

The State's Attorney of said County charges:

That on the below listed dates in 1998, in said County, DEONDERY L. CHAMBERS committed the offense of ESCAPE in that said defendant, having been convicted of aggravated battery, 98-CF-109, in violation of 720 ILCS 5/12-4(b)(8), a felony, knowingly failed to report November 27, 1998, December 4, 1998, December 11, 1998 and December 18, 1998, to the Jefferson County Jail, a penal institution, in violation of 720 ILCS 5/31-6(a), a class 3 felony.

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT
JEFFERSON COUNTY

[Filed FEB 24, 1999]

Case No. 99-CF-47

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

DEONDERY L. CHAMBERS
Defendant

PLEA OF GUILTY AND WAIVER OF JURY

ESCAPE COUNT I

I, THE UNDERSIGNED, Defendant in the above entitled cause, hereby enter a plea of guilty in manner and form as charged therein in the INFORMATION/COMPLAINT/INDICTMENT and each count thereof, filed in said cause. I HEREBY WAIVE A Trial by Jury and consent to an immediate hearing, and also consent that the Court fix my punishment under my plan herein. I am 19 years of age.

Done in open Court, at Mt. Vernon, Illinois, this 24th day of February A.D. 1999.

/s/ Deondery Chambers
Defendant

Street City State

Phone

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
JEFFERSON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
Deondury L. Chambers
Defendant.

No. 98CF17
98CF109
99CF47

☐ SENTENCING JUDGMENT
☒ JUDGMENT OF PROBATION
(After Revocation in 98CF17 & 98CF109)

☐ JUDGMENT OF CONDITIONAL DISCHARGE
☐ ORDER FOR SUPERVISION _____ PROBATION

Defendant has been found guilty of the offense of Unl. Poss. of A Controlled Substance (Class 4 felon Robbery (Class 2 felony), Agg. Battery (Class 3 felony) + Escape (Class 3 felony

X Defendant is represented by counsel, Bob Verhines
___ Counsel is waived intelligently, knowingly, and voluntarily.

The Court has considered the statutory factors required to impose sentence or disposition and

IT IS ORDERED that commencing on this date 2-24-99:

FILED
SECOND JUDICIAL COURT
FEB 24 1999
Gene Goforth
CLERK OF CIRCUIT COURT
JEFFERSON COUNTY ILLINOIS

☒ Judgment is entered and the Defendant is sentenced to
☐ Probation for a term of 30 months
☐ Conditional Discharge for a term of _____

☐ Without entering a judgment, Defendant is placed on:
☐ Court Supervision for a term of _____
☐ Section _____ Probation for a term of _____

IT IS THE FURTHER ORDER OF THE COURT THAT YOU SHALL COMPLY WITH THE TERMS AND CONDITIONS WHICH ARE MARKED [X] AS FOLLOWS:

☒ 1. You shall not violate any criminal statute or ordinance of any jurisdiction.

☒ 2. You shall report to or appear in person before the Probation Officer within 7 days and further as the Probation Officer shall direct.

☒ 3. You shall not possess a firearm or other dangerous weapon and shall surrender to the Clerk of the Court your Firearm Owners Identification card for the term of this Order.

☒ 4. You shall not leave the State of Illinois without the consent of the Court or, in circumstances in which the reason for the absence is of such emergency nature that prior consent by the Court is not possible, without prior notification and approval of your Probation Officer.

☒ 5. You shall permit the Probation Officer to visit at your home or elsewhere to the extent necessary to discharge the Officer's duties. You shall advise the Probation Officer as to your residence and employment and shall notify the Probation Officer within 2 days as to any change thereof.

☒ 6. You shall not have in your body the presence of any alcohol or illicit drug prohibited by the Cannabis Control Act (720 ILCS 550/1) or the Illinois Controlled Substance Act (720 ILCS 570/100) unless prescribed by licensed physician and shall submit to any random alcohol or drug testing ordered by the Probation Officer and pay cost thereof, and shall undergo any substance abuse counseling or treatment directed by the Probation Officer and pay any cost thereof.

☒ 7. You shall pay a fine of $ previously ordered fines + costs in 98CF17 98CF109 + Ct. costs only in 99CF47; a domestic violence fine/domestic battery fine/sexual assault fine/child pornography fine/street value fine of $_____; plus court costs, including arrestee medical fee, drug/DUI lab fee according to the following payment schedule: $_____ per _____ beginning _____ to be paid in full within _____. All payments shall be made to the Circuit Clerk.

☐ An Order of Withholding is entered pursuant to Illinois Revised Statutes, 730 ILCS 5/5-9-4.

☐ 8. You shall pay a drug assessment of $_____ according to the payment schedule set forth in Paragraph 7.

06/26/08 14:05 FAX 618 482 8057 FED PUBLIC DEFENDER ESL 006

70

☐ The drug assessment is converted to public service work (with 1 hour to be equivalent to $4) for a period of _____ under the terms and conditions listed in paragraph 11.

☐ The drug assessment collection is suspended until _____ during your participation in the _____ program or a substance abuse intervention or treatment program approved by the Probation Officer, and you shall pay all cost thereof. If you successfully complete said program, you may apply to court for a reduction in the drug assessment by amount of cost of said program.

☐ 9. You shall undergo a psychological assessment by _____ or a licensed facility approved by the Probation Officer and, if required by said facility or the Probation Officer, complete psychological evaluation, counseling, or treatment as an outpatient for the period of time required by said facility or the Probation Officer and shall pay all cost thereof.

☐ 10. You shall serve a term of home confinement at _____ or any location subsequently approved by the Probation Officer for a period of _____ beginning _____ from _____ until _____ each day. You shall remain within the interior of the place designated for your confinement during the hours designated and shall not leave your confinement except for the reasons set forth on the attached **"Conditions of Release from Home Confinement/Custodian's Home."**

☐ As part of this home confinement, you shall be placed on an approved monitoring device as provided by law with your consent and/or other person in residence with you and shall comply with the terms and conditions of an agreement with _____ and shall pay all cost thereof, according to the following schedule: Initial charge of $_____ within 7 days and _____ per _____ beginning _____ and continuing on the same day of each _____ thereafter until home confinement is terminated.

You shall admit the Probation Officer into your place of confinement at any time for the purpose of verifying your compliance with the conditions of your confinement.

☐ 11. You shall participate in and complete the requirements of the _____ program and shall report to said program as _____ or the Probation officer shall direct and pay all cost thereof.

☒ 12. You shall not contact, ~~be in the presence of, or go upon the premises of~~ Brenda Anderson, James Anthony, Debbie Farrells & Romanda Bootcheu

☐ 13. You shall obey the provisions of an Order of Protection entered in case number _____.

☐ 14. You shall become and remain gainfully employed by _____ or by an employer approved by the Probation Officer for at least _____ hours per week beginning _____ and shall present satisfactory evidence thereof to the Probation Officer.

☐ 15. You shall pursue and complete a course of study or vocational training at _____ or an institution approved by the Probation Officer beginning _____ and shall present satisfactory evidence thereof to the Probation Officer.

☐ 16. You shall support your dependents as required by law and, in addition, as required in case number _____ and shall present satisfactory evidence thereof to the Probation Officer;

☐ 17. You shall not operate any motor vehicle except in the course of your employment.

06/18/98 14:06 FAX 618 482 8057 FED PUBLIC DEFENDER ESL 007

☐ 18. You shall make restitution of $_____ to _____ according to the payment schedule set forth in Paragraph 7. A judgment for this amount is entered in favor of said victim. The Circuit Clerk shall enter this judgment in the judgment docket.

☐ 19. You shall make a contribution of $_____ to the local anti-crime program to be paid according to the payment schedule set forth in Paragraph 7.

☐ 20. You shall perform public service work under the direction and supervision of _____ or the Probation Officer for a period of _____. You shall abide by all the rules and responsibilities of the community service program of the Jefferson County Probation Department. You shall not be entitled to any compensation therefore and shall not be considered an employee for any purpose, including worker's compensation coverage;

☒ 21. You are sentenced to a term of 6 months in Jeff. Co. Jail as set forth in the Order attached hereto. No day for day credit to apply. This sentence shall be stayed so long as defendant is in compliance w/ all aspects of this ord

☐ 22. You shall submit to Genetic Marker Group (DNA) and HIV blood testing as set forth in the Order attached hereto.

☒ 23. You shall undergo an alcohol and drug assessment by TASC or a licensed agency approved by the Probation Officer and, if required by said agency or the Probation Officer, complete a remedial education course and/or an alcohol and drug evaluation, counseling, or treatment as an inpatient or outpatient for the period of time required by said agency or the Probation Officer. You shall report to said agency within 7 days and further as said agency or the Probation Officer shall direct and pay all costs thereof;

☒ 24. A Review Hearing is set for 4/14/99 at 9AM when you shall appear and the Court shall review the terms and conditions required to be met in this Order. If all terms and conditions are met, then you shall not be required to appear at the Review Hearing.

☒ 25. IT IS FURTHER ORDERED that you shall be subject to the Administrative Sanctions Program established by the Chief Judge of the Second Judicial Circuit. The Probation Department may invoke any sanction of this Program for violation of the terms and conditions of this Order.

☒ 26. IT IS FURTHER ORDERED that, upon motion of the State's Attorney, the Court allows the State's Attorney a per diem fee of $25.00 for each of 1 days actually employed in the trial of this cause.

☒ 27. IT IS FURTHER ORDERED that, having considered your ability to pay, a probation fee of $25.00 _____ for each month of actively supervised public service work, probation, conditional discharge, or supervision is imposed upon you as costs.

☐ 28. IT IS FURTHER ORDERED that at the conclusion of the term of supervision/Section ____ probation, if the Court determines that you have successfully complied with all of the terms and conditions of this Order, the Court shall enter a judgment dismissing this cause.

☐ 29. _____

_____

_____

Date: 2-24-99 JUDGE Terry H. Tamber

I hereby certify that I have been given a copy of this order, that I have read it, that I understand it, and that I promise to comply with its terms and conditions. That I further understand that failure to comply with the terms and conditions of this Order may result in revocation of my probation/supervision.

Date: _____ _____
Defendant

02/25/98 14:06 FAX 618 482 9057 FED PUBLIC DEFENDER ESL 008

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
JEFFERSON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff)
)
vs.)
)
Deandre L. Chambers)
Defendant)

No. 98CF17
98CF109
99CF47

FILED
SECOND JUDICIAL COURT
JUN 30 1999
CLERK OF THE CIRCUIT COURT
JEFFERSON COUNTY, ILLINOIS

✓ PETITION TO REVOKE PROBATION
PETITION TO REVOKE CONDITIONAL DISCHARGE
PETITION TO REVOKE COURT SUPERVISION

Now come the People of the State of Illinois, by Nicole L. Villani Assistant State's Attorney for Jefferson County Illinois, pursuant to Chapter 730, Illinois Compiled Statutes Section 5/5-6-4, and petition this Court to enter an order revoking the defendants ___ Probation ___ Conditional Discharge ___ Court Supervision and allocating jail credit, if any, and resentencing after a hearing on the Petition, and in support thereof state as follows:

1. That on or about the 24th day of February, 19 99, the defendant was placed on ___ Probation ___ Conditional Discharge ___ Court Supervision by this Court for a period of 30 months;
2. That in violation of said Order said defendant did:
___ willfully and contumaciously fail to pay fines, costs and/or restitution as ordered;
___ fail to appear before this Court for a review hearing as ordered on ___;
___ fail to report for imprisonment as ordered in that said defendant failed to report to the Franklin County jail on the ___ day of ___, 19 ___;
X fail to successfully complete drug and/or alcohol counseling as ordered; TASC
___ use or consume alcohol and/or controlled substance;
___ possess a firearm or other dangerous weapon;
___ leave the state of Illinois without consent of the Court or approval of the Probation Officer;
___ fail to perform public service work as ordered;
___ fail to report to said defendant's Probation Officer during the month(s) of ___;

WHEREFORE, the People respectfully pray that this Court issue a:

___ warrant with bail in the amount of ___; ___ summons ___ notice to appear to bring the defendant before this Court for advisement on this Petition, and at said advisement set a hearing on this Petition, and that after such hearing, the Court enter an order revoking the sentence previously imposed on this defendant, and that the Court set this case for a resentencing hearing.

Nicole L. Villani
Nicole L. Villani Assistant State's Attorney

Sworn to before me this 30th day of June, 1999

Terry K. Hamber
Notary Public
Judge

06/25/00 14:06 FAX 618 482 9057 FED PUBLIC DEFENDER ESL 008

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
Jefferson COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff

Deonderyn L. Chambers Defendant

No. 99 CF 47

FILED
SECOND JUDICIAL COURT
JUN 30 1999
George Ruebenbach
CLERK OF THE CIRCUIT COURT
JEFFERSON COUNTY, ILLINOIS

SENTENCING JUDGMENT
ILLINOIS DEPARTMENT OF CORRECTIONS

The Court has considered the statutory factors required to impose sentence and FINDS:

1. The Defendant, whose date of birth is 7/7/[illegible], has been adjudged guilty of the offenses enumerated below.

☐ 2. That the conduct leading to the conviction for the offenses enumerated in Counts _____ caused great bodily harm to the victim (730 ILCS 5/5-6-3(a)(2)(iii)).

☐ 3. That the Defendant is convicted of a Class _____ offense but sentenced as a Class X offender (730 ILCS 5/5-5-3(c)(8)).

IT IS, THEREFORE, ORDERED, as follows:

A. That the Defendant be and is hereby sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense:

Count	Offense	Date of Offense	Statutory Citation	Class	Sentence	MSR*
I	Escape	12-27-98 to 1-19-99	720 ILCS 5/31-6(a)	3	5 Yrs. 0 Mos.	1

and said sentence shall run (concurrent with) (consecutive to) the sentence imposed in Counts _____

Count	Offense	Date of Offense	Statutory Citation	Class	Sentence	MSR*
					Yrs. Mos.	

and said sentence shall run (concurrent with) (consecutive to) the sentence imposed in Counts _____

Count	Offense	Date of Offense	Statutory Citation	Class	Sentence	MSR*
					Yrs. Mos.	

and said sentence shall run (concurrent with) (consecutive to) the sentence imposed in Counts _____

Count	Offense	Date of Offense	Statutory Citation	Class	Sentence	MSR*
					Yrs. Mos.	

and said sentence shall run (concurrent with) (consecutive to) the sentence imposed in Counts _____

☒ B. That the sentence(s) imposed on count(s) I be (concurrent with) (consecutive to) the sentence imposed in case number 99CF 57 in the Circuit Court of Jefferson County, be (concurrent with) (consecutive to) the sentence imposed in case number 98CF 17 in the Circuit Court of Jefferson County, be (concurrent with) (consecutive to) the sentence imposed in case number 98CF 118 in the Circuit Court of Jefferson County.

☒ C. That if the Defendant is accepted in the Impact Incarceration Program by the Illinois Department of Corrections, the Court approves placement of the Defendant in said program pursuant to the Supplemental Sentencing Order which is attached.

D. That the Defendant is entitled to receive credit for time actually served in custody as shown by the "Sheriff's Certificate of Time — Defendant Held in Custody" attached to this Judgment.

E. That the Clerk of the Court shall deliver a certified copy of this Judgment to the Sheriff who shall take the Defendant into custody and deliver him to the Department of Corrections to be confined until the expiration of the Defendant's sentence or until the Defendant is otherwise released by operation of law.

F. That the Department of Corrections withhold 33 % (per cent) (Percentage may not be more than 50%) of the inmate's monthly Corrections income and remit that amount to the Jefferson County Circuit Clerk for application to amounts due in this case for a total amount due of $ _____.

G. That this Judgment shall be effective immediately/stayed until July 8, 1999 at 9 A.M.

H. Defendant shall pay the costs of this matter within the term of the mandatory supervised release.

I. Other: _____

DATED: 6/30 1999

ENTER: Terry H. Hamber
PRESIDING JUDGE

*Mandatory Supervised Release

C:\CFORMS\CRIMINAL\JUDGORD.MOD

Rev. 4/8/98

06/25/99 14:06 FAX 618 482 9057 FED PUBLIC DEFENDER ESL 010

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT
JEFFERSON COUNTY, ILLINOIS

[Filed JUN 30, 1999]

Case No. 99-CF-47
99 CF 157
98 CF 109
98 CF 17

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

v.

DEONDERY L. CHAMBERS,
Defendant.

SUPPLEMENTAL SENTENCING ORDER IMPACT INCARCERATION PROGRAM

The Defendant has been found guilty and sentenced to the Illinois Department of Corrections as set forth on the "Sentencing Judgment — Illinois Department of Corrections" to which this Supplemental Sentencing Order is attached. The Court, having considered the provisions of 730 ILCS 5/5-8-1.1 FINDS:

1. That the Defendant meets the eligibility requirements of Section 5/5-8-1.1(b)1-6.

2. That the Defendant has consented in writing to participation in the Impact Incarceration Program and to the terms and conditions thereof as set forth on the attached Consent.

3. That this court recommends and approves this Defendant for placement in the Impact Incarceration Program.

IT IS THEREFORE ORDERED:

A. That the Defendant is sentenced to 7 years/ ~~months~~ in the Illinois Department of Corrections as set forth in the attached "Sentencing Judgment — Illinois Department of Corrections" to which this Supplemental Sentencing Order is attached.

B. That if the Department of Corrections accepts the Defendant in the Impact Incarceration Program and determines that the Defendant has completed the program, the Department of Corrections shall certify to this Court that the Defendant has successfully completed the Impact Incarceration Program.

C. That upon certification to the Court by the Department of Corrections that the Defendant has successfully completed the program, this sentence to the Illinois Department of Corrections shall be reduced to the time served by the Defendant in the Impact incarceration Program.

D. That if the Defendant is not accepted for placement in the impact Incarceration Program, or if the Defendant fails to successfully complete that program, the Defendant's term of imprisonment to the Illinois Department of Corrections shall remain as set forth in the Sentencing Judgment to which this Supplemental Order is attached.

Date: 6/30, 1999

ENTER: /s/ Terry H. Gamber
JUDGE

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT
JEFFERSON COUNTY, ILLINOIS

[Filed JUN 30, 1999]

Case No. 99-CF-47
99 CF 157
98 CF 109
98 CF 17

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

v.

DEONDERY L. CHAMBERS,
Defendant.

CONSENT TO PARTICIPATION IMPACT INCARCERATION PROGRAM

The undersigned Defendant, having been sentenced to 7 years/months in the Illinois Department of Corrections, does hereby state:

1. That I am between 17 and 35 years of age.

2. That I have not previously participated in the Impact Incarceration Program.

3. That I have not previously served more than one prior sentence of imprisonment for a felony in an adult correctional facility.

4. That I have not previously been convicted nor is this offense for any of the following offenses: Class X Felony; First or Second degree murder; Armed violence; aggravated kidnaping criminal sexual assault,

aggravated criminal sexual abuse, forcible detention, arson, or a subsequent conviction for criminal sexual abuse.

5. That the term of imprisonment for which I am being sentenced is eight years or less.

6. That I am physically able to participate in strenuous physical activities or labor.

7. That I do not have any mental disorder or disability that would prevent participation in the Impact Incarceration Program.

8. That I am aware of the provisions of the impact incarceration program and the terms and conditions of said program.

9. That I consent to participation in the impact incarceration program and shall comply with all Department of Corrections rules and requirements of said program.

Dated: 6/30, 1999

/s/ Deondery Chambers
Defendant

EXECUTED in open court on the date set out above.

/s/ Terry H. Gamber
JUDGE

[LOGO]
Gary Duncan
State's Attorney
Jefferson County

Jefferson County Courthouse
Mount Vernon, Illinois 62864
Telephone: 618/244-8025
Fax: 618/244-7235

STATEMENT OF FACTS IN THE CAUSE PEOPLE VS. DEONDERY L. CHAMBERS, JEFFERSON COUNTY, IL CAUSE NUMBER 99-CF-47, (COUNT I-ESCAPE) (CLASS 3 FELONY).

06/30/99: Deondery L. Chambers entered a guilty plea to a petition to revoke probation and was sentenced to five (5) years in the Illinois Department of Corrections, with a one (1) year mandatory supervised release period. The sentence imposed in this cause runs concurrent with the sentence imposed in Jefferson County, IL cause number 99-CF-157. The sentence imposed in this cause also runs concurrent with the sentence imposed in Jefferson County, IL cause number 98-CF-17 and concurrent with the sentence imposed in Jefferson County, IL cause number 99-CF-109. The offense in Count I occurred from 11/27/98 to 12/18/98.

Deondery L. Chambers failed to report to the Jefferson County Jail, a penal institution, per order on 11/27/98, 12/04/98, 12/11/98 and 12/18/98.

02/24/99: Deondery L. Chambers pleaded guilty to Count I-Escape, a class 3 felony. Count II-Escape, a class 3 felony and Count III-Escape, a class 3 felony, were dismissed. Deondery L. Chambers was placed on thirty (30) months probation

06/30/99: A petition to revoke probation was filed due to the defendant's failure to successfully complete drug and alcohol counseling as ordered.

The judgment is stayed until July 8, 1999 at 9:00 a.m. at which time Deondery L. Chambers shall report to the Jefferson County Jail to await transportation to the Illinois Department of Corrections.

The defendant has been recommended for the impact incarceration program. See the paperwork in regard to impact incarceration.

/s/ Gary Duncan
GARY DUNCAN
Jefferson County State's Attorney

July 6, 1999

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
JEFFERSON COUNTY, ILLINOIS

[Filed AUG 04, 1999]

No. 99-CF-47
99-CF-157
98-CF-17
98-CF-109

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

-vs-

DEONDERY CHAMBERS,
Defendant.

MOTION TO WITHDRAW GUILTY PLEA

NOW COMES the Defendant, Deondery Chambers, by his Attorney, Bob Verhines and moves this Court to withdraw his guilty plea in the above-captioned cause. In support, thereof defendant states as follows:

1. That on June 30, 1999, the defendant was sentenced in the above cause. That more than 30 days has passed, however counsel was not notified by defendant until after time had lapsed and Attorney client communication was hindered by defendant's incarceration.

2. That not more than 30 days have passed since the imposition of sentence on July 8, 1999.

3. That the defendant's plea of guilty was not knowing and voluntary because he did not realize the

approximate time to be spent in the Illinois Department of Corrections

4. That the defendant's plea of guilty was the result of misapprehension of law and fact.

5. Defendant's plea was not knowingly entered in that he did not understand the consequences of pleading guilty to a felony, but entered a plea to get out of jail.

WHEREFORE, defendant respectfully requests this Court to grant this motion to withdraw guilty plea.

/s/ Bob Verhines
BOB VERHINES
Jefferson Co. Public Defender

[LOGO]

Illinois Department of Corrections

George H. Ryan
Governor

Donald N. Synder
Director

Graham Correctional Center
R.R. #1, Highway 185
P.O. Box 499 Hillsboro, IL 62049
Telephone: (217) 532-6961
TDD: (800) 526-0844

October 21, 2002

Jefferson County
Jefferson County Courthouse
100 S. 10th Street
Room 105
Mt. Vernon, IL 62864

RE: Case #99-CF-157, 98-cf-109, 98-cf-17, 99-cf-47

Dear Sir:

Please be advised Inmate Deondery Chambers, K89251 was paroled from this facility on October 9, 2002.

We had been making Court Ordered payments for him on the above listed Case. We show a balance still due of $217.22, 1,767.73, 774.32, 824.33 respectively.

Upon his release, he gave the following forwarding address: c/o Shonda Neal, 1000 S. 6th, Mt. Vernon, IL 62864.

If you need any other information, please contact our Business Office at (217) 532-6961, Ext. 2228.

Sincerely,

/s/ Steven C. Bryant
Steven C. Bryant, Warden
Graham Correctional Center

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

FILED
MAY 16 2006
G. PATRICK MURPHY
DISTRICT JUDGE
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS, ILLINOIS

UNITED STATES DISTRICT COURT
Southern District of Illinois

UNITED STATES OF AMERICA
V.

DEONDERY LAZAR CHAMBERS, II
a/k/a Deondery L. Chambers

JUDGMENT IN A CRIMINAL CASE

Case Number: 05-40044-001-JLF

USM Number: 06730-025

Phillip J. Kavanaugh, Federal Public Defender
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:922(g)(1), 924(a)(2), 924(e)	Felon in Possession of a Firearm	May 31, 2005	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 12, 2006
Date of Imposition of Judgment

G. Patrick Murphy

Signature of Judge

G. Patrick Murphy, Chief Judge
Name and Title of Judge

05/16/06
Date

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

188 months

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court, not to exceed 52 tests in a one year period.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release. The defendant shall pay the fine in installments of $20.00 per month or 10% of his net monthly income, whichever is greater.

The defendant shall provide the probation officer and the Financial Litigation Unit of the United States Attorneys' Office with access to any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation. The defendant shall immediately notify the probation officer of the receipt of any indicated monies.

The defendant shall participate as directed and approved by the probation officer in treatment for narcotic addiction, drug dependence, which includes urinalysis or other drug detection measures and which may require residence and/or participation in a residential treatment facility. Any participation will require complete abstinence from all alcoholic beverages. The defendant shall pay for the costs associated with substance abuse counseling and/or testing based on a co-pay sliding fee scale approved by the United States Probation Office. Co-pay shall never exceed the total costs of counseling.

The defendant shall submit his person, residence, real property, place of business, computer, or vehicle to a search, conducted by the United States Probation Officers at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 750.00	$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case*(AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0	$ 0

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments are due immediately, through the Clerk of the Court, but may be paid from prison earnings in compliance with the Inmate Financial Responsibility Program. Any financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of $20.00 per month, or 10% of defendant's monthly net earnings, whichever is greater.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-2405

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEONDERY CHAMBERS,
Defendant-Appellant.

Argued Dec. 13, 2006
Decided Jan. 9, 2007
Rehearing and Rehearing En Banc
Denied Feb. 16, 2007.

Before POSNER, MANION, and EVANS, *Circuit Judges*.

POSNER, Circuit Judge.

The defendant pleaded guilty to being a felon in possession of a firearm. The judge, finding that the defendant had committed three crimes of violence previously, sentenced him to 188 months as an armed career criminal. 18 U.S.C. § 924(e). The only question presented by the appeal is whether one of those convictions, a conviction under Illinois law for escape, was indeed a crime of violence. The answer depends on whether escape "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(1). A jail break does; but Illinois defines felonious escape not only as "intentionally escap[ing] from

a penal institution or from the custody of an employee of that institution" but also as "knowingly fail[ing] to report to a penal institution or to report for periodic imprisonment at any time." 720 ILCS 5/31-6(a). The defendant's escape was in the latter category—failing to report to a penal institution. The charging document is not in the record, but as summarized in the presentence investigation report and not challenged by the defendant it states that on four occasions he failed to report on schedule to a penal institution after being convicted for drug possession, robbery, and aggravated battery.

As an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often "involves conduct that presents a serious potential risk of physical injury to another." *United States v. Golden*, 466 F.3d 612, 616-17 (7th Cir.2006) (Williams, J., dissenting). You could show up an hour late (without an excuse) and be guilty of a felony that could result in your receiving a 15-year mandatory minimum sentence under the Armed Career Criminal Act. Had the defendant been sentenced without the enhancement, his guidelines sentencing range would have been 130 to 162 months. See U.S.S.G. §§ 2K2.1(a)(2), (b)(5), 3C1.2, 3E1.1(a), (b).

But the majority opinion in *Golden*, tracking our earlier opinion in *United States v. Bryant*, 310 F.3d 550 (7th Cir.2002), refused to carve the Illinois escape statute at the joint, as it were, but held instead that *any* violation of the statute is a crime of violence for purposes of the Act. The other courts of appeals, except the D.C. and Ninth Circuits, are in accord. *United States v. Winn*, 364 F.3d 7 (1st Cir.2004);

United States v. Luster, 305 F.3d 199, 202 (3d Cir.2002); *United States v. Jackson*, 301 F.3d 59, 63 (2d Cir.2002); *United States v. Turner*, 285 F.3d 909, 915-16 (10th Cir.2002); *United States v. Gay*, 251 F.3d 950 (11th Cir.2001) (per curiam); *United States v. Nation*, 243 F.3d 467, 472 (8th Cir.2001); *United States v. Ruiz*, 180 F.3d 675 (5th Cir.1999); *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir.1999); *United States v. Mitchell*, 113 F.3d 1528, 1533 (10th Cir.1997). The D.C. Circuit reserved the issue in *United States v. Thomas*, 333 F.3d 280, 282-83 (D.C.Cir.2003). See also *United States v. Adkins*, 196 F.3d 1112, 1119 (10th Cir.1999) (McKay, J., concurring), and Judge Rovner's concurring opinion in our *Golden* case. The Ninth Circuit ruled that a peaceful failure to return, followed by the defendant's turning himself in rather than being recaptured, is not a crime of violence. *United States v. Piccolo,* 441 F.3d 1084 (9th Cir.2006).

All these cases involved either a failure to return to a halfway house—a type of failing to return that seems even less violence-prone than failing to show up at prison, because a violent prisoner would be less likely to be serving a part of his sentence in a halfway house—or a "walkaway" escape, which does not involve breaking out of a building or wrestling free of guards. There would be no impropriety in dividing escapes, for purposes of "crime of violence" classification, into jail or prison breaks on the one hand and walkaways, failures to report, and failures to return, on the other. The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), to decide which bin a conviction for escape belonged in.

But we shrink from trying to overrule a decision that is only a few months old (*Golden* was decided on October 25, 2006), that tracked an earlier and materially identical decision of this court (*Bryant*), and that has overwhelming support in the decisions of the other circuits. The defendant has not presented us with arguments or evidence that were overlooked or unavailable in the previous cases. He cites us to *United States v. Hagenow*, 423 F.3d 638, 644-45 (7th Cir.2005), which held that because the offense of "confinement" in Indiana can be committed without endangering the person confined, the sentencing judge has to look behind the label of the defendant's conviction to see whether his conduct endangered anyone. But the defendant in this case is not asking for a deeper investigation into the circumstances of his failure to report. He is asking us to carve out noncustodial from custodial escape, and that is the move rejected in *Bryant* and *Golden*, as well as in the cases we cited from other circuits.

We shall adhere to the precedents for now. But it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses. The head of the line of cases that lump all escapes together, *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir.1994), states in colorful language quoted in many of the subsequent cases that "every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so .... A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those

trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees .... [E]ven in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious risk that injury will result when officers find the defendant and attempt to place him in custody." (Emphasis in original.) This is conjecture floating well free of any facts—even the facts of *Gosling*. The opinion says nothing about the nature of Goslin's escape, but the reference to escaping from a jail suggests that the court wasn't thinking about walkaway escapes, or failures to return or report, but about jail breaks (most jail breaks are stealthy). Its ruminations should not be treated as authoritative in a case that does not involve a jail break.

The Sentencing Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report or return. Should it turn out that the latter frequency is very low, this would provide a powerful reason to reexamine *Bryant* and *Golden*. Alternatively, Congress, which has investigative tools, might examine the issue with a view toward a possible clarification of 18 U.S.C. § 924(e)(1).

The most helpful analysis of escapes from United States prisons that we have found, Richard F. Culp, "Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data," 85 *Prison J.* 270 (2005), unfortunately excludes from its study "walkaways from minimum-security facilities, failures to return from approved absences, and escapes from custody staff while being transported outside," *id.* at 275, although almost 90 percent of all

escapes are walkaways. *Id.* at 278; Camille Graham Camp & George M. Camp, "The Corrections Yearbook 1997" 18 (Criminal Justice Institute, Inc., 1997). And while the Culp study includes recaptures after an escape, it does not reveal whether a recapture involved violence. *Id.* at 281-82. More than 6 percent of the escapees committed crimes while on the lam, and many of these were violent crimes, *id.* at 285-86, but that is not evidence that escape itself is likely to be violent; for all that appears, the escapees were merely resuming their previous criminal careers. Six percent of the escapes in the study involved violence against prison staff, *id.* at 285—violence on the way out, as it were—but there is no indication of how many of the recaptures (some 75 percent of escaped prisoners are recaptured, *id.* at 282) involved violence. The study notes that records of prison escapes are not standardized and that recapture data are even less reliable than escape data. *Id.* at 271, 277, 281.

It is apparent that more research will be needed to establish whether failures to report or return have properly been categorized by this and most other courts as crimes of violence. Notice too that if courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of walkaways could well compel a conclusion that escape is never a crime of violence. Some disaggregation seems indicated, but to do it sensibly we judges need data.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 16, 2007

Before

Hon. Richard A. Posner, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 06-2405

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEONDERY CHAMBERS,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.

No. 4:05-cr-40044-JLF

G. Patrick Murphy, *Chief Judge*.

ORDER

On January 22, 2007, defendant-appellant filed a petition for rehearing with suggestion for rehearing *en banc*, and on February 12, 2007, plaintiff-appellee filed an answer to the petition. All the judges on the origi-

nal panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

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(3)

Supreme Court, U.S.
FILED
JUL 3 0 2008
OFFICE OF THE CLERK

No. 06-11206

IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 473 F.3d 724 (7th Cir. 2007). It is reproduced in the Joint Appendix at JA 90-95. The district court held a sentencing hearing on May 12, 2006, at which it orally ruled that defendant's prior conviction for escape under Illinois law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The transcript of that hearing is reproduced in its entirety at JA 16-63.

JURISDICTION

The court of appeals issued its opinion on January 9, 2007. Petitioner timely sought rehearing, which was denied on February 16, 2007. Petitioner timely filed his petition on May 8, 2007. The petition was granted on April 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 924(e) provides, in pertinent part, as follows:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another ....

STATEMENT OF THE CASE

Petitioner's sentence was enhanced by more than five years pursuant to the Armed Career Criminal Act ("ACCA" or "Act"), 18 U.S.C. § 924(e)(1), based on the view that the mere failure to report for periodic confinement is a "violent felony" within the meaning of the ACCA. That counterintuitive result is wrong. The "conduct" involved in failure-to-report escape is, in fact, no conduct at all. It is a crime of *inaction*. The passive inaction required to commit the offense cannot be the purposeful, violent and aggressive conduct that just last term in *Begay* v. *United States*, 128 S. Ct. 1581, 1586 (2008), this Court made clear is required by the definition of "violent felony." In addition, the portion of the definition of "violent felony" which the court of appeals held extends to petitioner's conviction for failure-to-report escape is limited to property crimes. Failure-to-report escape is

not a property crime. For each of these reasons, the judgment of the court of appeals should be reversed.

1. In July 1998, petitioner pleaded guilty to robbery and aggravated assault and to an unrelated drug possession charge. Sealed JA 107, 110. Part of petitioner's sentence included periodic confinement for 11 weekends in the Jefferson County, Illinois jail. *Id.* Petitioner failed to report for this periodic incarceration on November 27, 1998, December 4, 1998, December 11, 1998, and December 18, 1998. JA 67, 79.

Two months later, on February 17, 1999, petitioner was arrested and charged with "escape" under Illinois law. JA 68. He pleaded guilty.

The Illinois "escape" statute describes two distinct crimes, drawing "an express distinction between the act of 'escape' and that of 'failure to return.'" *People* v. *Bowden*, 730 N.E.2d 128, 142 (Ill. App. Ct. 2000). Failure-to-report (or failure to return from furlough or work-release) escape is a lesser crime than custodial escape.

> A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement is guilty of a Class 3 felony.

720 Ill. Comp. Stat. 5/31-6(a).[1]

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[1] Similarly, federal law and the law of 31 other states, expressly distinguishes failure-to-report (or failure-to-return) from escape from confinement. *See* 18 U.S.C. §§ 751, 3146; Ala. Code §§ 13A-10-32, 14-8-42; Alaska Stat. §§ 11.56.310, 11.56.335; Cal. Penal Code § 4530(a) & (c); Conn. Gen. Stat. §§ 53a-169, 53a-170; Fla. Stat. §§ 944.40, 945.091(4); Ga. Code Ann. § 16-10-52(a)(1) & (5); Ind. Code Ann. § 35-44-3-5(a) & (c); Iowa Code § 719.4(1) & (3); La. Rev. Stat. Ann. § 14:110; Me. Rev. Stat. Ann. tit. 17-A, § 755; Md. Code Ann. Crim. Law §§ 9-404, 9-405; Mass. Gen. Laws ch. 268, § 16; Mich. Comp. Laws § 750.193; Miss. Code Ann. §§ 97-9-45, 97-9-49; Mo. Rev. Stat. §§ 575.200, 575.220; Mont. Code Ann. § 45-7-306(2); Neb. Rev. Stat. §§ 28-908, 28-912; N.H. Rev. Stat. Ann. §§ 642:6, 651:24; N.J. Stat. Ann. § 2C:29-5; N.Y. Penal Law §§ 205.10, 205.15, 205.16, 205.17; Nev. Rev. Stat. §§ 212.090, 212.095; N.C. Gen. Stat. § 148-45; N.D. Cent. Code §§ 12.1-08-05, 12.1-08-06; Ohio Rev. Code Ann. § 2921.34; Or. Rev. Stat. §§ 162.165, 162.205; 18 Pa. Con. Stat. § 5121; S.D. Codified Laws §§ 22-11A-2, 22-11A-2.1, 24-8-6; Tenn. Code Ann. §§ 39-16-605, 39-16-609(a); Vt. Stat. Ann. tit. 13, § 1501(a) & (b); Wis. Stat. §§ 946.42, 946.425; Wyo. Stat. §§ 7-13-702, 7-16-309, 7-18-112. In addition to Illinois, 12 states treat failure to report or failure to return as a lesser grade of crime than custodial escape. *See* Alaska Stat. §§ 11.56.310, 11.56.335 (Class C v. Class B); Cal. Penal Code § 4530(c) (does not count as a prior felony conviction in subsequent prosecution); Conn. Gen. Stat. §§ 53a-169, 53a-170 (Class D v. Class C, if working outside correctional institution and fail to return only); Ind. Code Ann. § 35-44-3-5(a) & (c) (Class D v. Class C); Iowa Code § 719.4(1) & (3) (Misdemeanor v. Class D); Me. Rev. Stat. Ann. tit. 17-A, § 755(1) & (1-C) (failure to report to furlough or rehab is Class D v. other escape, including failure to return is Class C); Md. Code Ann. Crim. Law §§ 9-404(c), 9-405(c) (failure to report is misdemeanor v. escape is felony); Mo. Rev. Stat. §§ 575.200, 575.220 (Class A misdemeanor v. Class D felony); Neb. Rev. Stat. §§ 28-908, 28-912 (failure to report is Class IV felony v. Class III felony); N.Y. Penal Law §§ 205.10, 205.15, 205.16, 205.17 (Class A misdemeanor or Class E felony v. Class E or Class D felony); S.D. Codified Laws §§ 22-11A-2, 22-11A-2.1 (Class 5 felony v. Class 4 felony); Vt. Stat. Ann. tit. 13, § 1501(a) & (b) (sentence of

The indictment charging petitioner with "escape" makes clear that he committed failure-to-report escape: "Deondery L. Chambers committed the offense of Escape in that said defendant, having been convicted of ... a felony, knowingly failed to report November 27, 1998, December 4, 1998, December 11, 1998 and December 18, 1998, to the Jefferson County Jail, a penal institution, in violation of 720 ILCS 5/31-6(a), a class 3 felony." JA 68. The elements of failure-to-report escape are (1) conviction of a felony, subjecting an individual to incarceration for which he (2) knowingly (3) fails to report to the penal institution. Petitioner was not charged with escape from a penal institution or from the custody of a penal institution employee.

There is no suggestion that petitioner's arrest following his failure to report involved any altercation between him and anyone, including any arresting officer. Indeed, there is no suggestion that an arresting officer even had to seek out petitioner or forcibly place him in custody.

Petitioner was not sentenced to serve any additional time of confinement as a result of his failure-to-report escape. (He had to make up the four weekends for which he failed to report. JA 21.) Instead, petitioner was sentenced to six months in jail (which was stayed), 30 months of probation, and fines and costs. Sealed JA 113.

2. On May 31, 2005, petitioner was involved in an altercation during which he discharged a firearm into

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up to 5 years v. up to 10 years). Five states define the term "escape" to include failure to return. *See* Ariz. Rev. Stat. § 13-2501(4); Kan. Stat. Ann. § 21-3809(b)(2); Ky. Rev. Stat. Ann. § 520.010(5); Minn. Stat. § 609.485; Tex. Penal Code Ann. § 38.01(2).

the air. Sealed JA 101-03. Petitioner fled the scene in a car. As police pursued, petitioner threw the firearm out of the window. *Id.* The car eventually stopped, and petitioner and the driver were taken into custody. Sealed JA 101-02.

The government charged petitioner as a felon in possession under § 922(g). JA 10. The government later sought to enhance petitioner's sentence for the offense based on its assertion that he qualified as an armed career criminal under the Act. JA 12-13. For the enhancement to apply, the government had to prove that petitioner had three prior convictions for a "violent felony or serious drug offense." 18 U.S.C. § 924(e). There is no dispute that petitioner had two such prior convictions: a July 15, 1998 conviction in Illinois for robbery and aggravated battery[2] and a June 30, 1999 conviction in Illinois for unlawful delivery of a controlled substance within 1000 feet of public housing. JA 12-13. The government asserted that petitioner's conviction for failure-to-report escape provided the necessary third predicate crime.

3. Petitioner pled guilty to the felon-in-possession charge, but disputed that he was subject to the ACCA's enhancement based on his conviction for failure-to-report escape. As the district court acknowledged, the question was whether a prior conviction for failure-to-report escape is a "violent felony" under the ACCA. JA 20.[3]

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[2] Petitioner's sentence for periodic confinement, for which he failed to report, arose from this conviction.

[3] The higher-class felony of custodial escape under Illinois law was not the predicate offense. This Court considers the predicate offense as a "categorical" matter, which directs a court to "consider whether the elements of the offense," as defined by the relevant statute, "are of the type that would justify its inclusion"

"Violent felony" is defined in two clauses of the ACCA. 18 U.S.C. § 924(e)(2)(B)(i) & (ii). There is no dispute that failure-to-report escape is not a "violent felony" within the meaning of the first clause, which covers offenses having "as an element the use, attempted use, or threatened use of physical force against the person of another."

The second clause begins by enumerating specific offenses—burglary, arson, extortion, and crimes involving the use of explosives. Obviously, failure-to-report escape is not an enumerated offense.

The government sought to sweep failure-to-report escape within the scope of what can be referred to as the "residual subclause" of the second clause of the definition of violent felony in the ACCA. The residual language is a *sub*clause because it appears after the enumerated offenses in clause (ii) rather than in its own clause. The residual subclause covers crimes that, though not burglary, arson, extortion, or involving the use of explosives, "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii).

The district court decided that it was bound by *United States* v. *Bryant*, 310 F.3d 550 (7th Cir. 2002).

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as a predicate offense under the Act. *James* v. *United States*, 127 S. Ct. 1586, 1594 (2007) (emphasis omitted); *Taylor* v. *United States*, 495 U.S. 575, 600 (1990). Where, as here, the underlying statute describes more than one offense, *see supra* at 3-4 (discussing 720 Ill. Comp. Stat. 5/31-6(a)), a court may look to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" to determine which was the predicate offense. *Shepard* v. *United States*, 544 U.S. 13, 15 (2005). In light of *Shepard*, and the charging document in the record, the court of appeals agreed that failure-to-report escape was the relevant predicate offense. JA 92.

In *Bryant*, the court of appeals refused to distinguish a failure to return to a halfway house from a custodial escape in determining whether the ACCA's sentencing enhancement applied. *Id.* at 553-54. In light of *Bryant*, the district court concluded that "escape is escape[] [a]nd we're not going to get into the nuances of it for the purposes of the sentencing statute. It counts. So we have here what is a career offender under the statute." JA 52.

Having determined that petitioner was an armed career criminal under the Act, the district court also applied Section 4B1.4 of the Sentencing Guidelines, which incorporates the same standards as the ACCA. This produced a guidelines range of 188 to 235 months. JA 55. The district court sentenced petitioner to 188 months, which is slightly more than the 15-year mandatory minimum required by the ACCA. JA 60. Had petitioner not been treated as an armed career criminal, he would have been subject only to § 922(g)'s unenhanced statutory maximum of 120 months. 18 U.S.C. § 924(a)(2).

4. Petitioner appealed his sentence to the Seventh Circuit, which affirmed. The court of appeals acknowledged that "[a]s an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often involves conduct that presents a serious potential risk of physical injury to another." JA 91 (internal quotations omitted). Yet, citing *Bryant* and even more recent circuit precedent, the panel determined that the distinction between custodial and failure-to-report escapes had been rejected, and that "for now" there was no reason to reconsider those decisions. JA 93.

The panel observed that the reasoning that has been employed to treat all escapes—custodial as well as failure-to-report—as presenting identical risks is based on "conjecture floating well free of any facts." JA 94. The panel considered the very reasoning by which it was bound "an embarrassment to the law." JA 93.

The Seventh Circuit issued its decision before either of this Court's two recent decisions, *James* v. *United States*, 127 S. Ct. 1586 (2007), and *Begay* v. *United States*, 128 S. Ct. 1581 (2008), considering the ACCA's definition of "violent felony." After deciding *Begay*, this Court granted certiorari in this case.

SUMMARY OF ARGUMENT

In *Begay*, this Court concluded that the residual subclause of the ACCA covers only those offenses that are similar to the enumerated offenses in those respects which led Congress to treat the enumerated offenses as exemplars of the kind of prior dangerous conduct it was targeting. The text, structure, drafting history, and purpose of the ACCA make clear that the residual subclause covers only those offenses that both involve conduct essential to commit the offense that is purposeful, violent and aggressive *and* target property. Failure-to-report escape satisfies neither criterion. It is not a "violent felony."

1. Because the conduct essential to commit failure-to-report escape is entirely *inactive*, it is not purposeful, violent and aggressive. The "act" of failing to report is itself without risk. It is far from the kind of dangerous conduct that characterizes the enumerated offenses and that likewise limits the scope of the residual subclause.

Conduct is purposeful, violent and aggressive when it shows that the offender is likely willing to harm another to carry out his plans by creating inherently dangerous circumstances similar to the circumstances created by the conduct essential to commit the enumerated offenses. The conduct involved in the enumerated offenses reveals the offender's willingness to harm another either through his awareness that a confrontation with another may occur in the course of committing the offense (as with burglary and extortion), or by unleashing a force that necessarily would harm others in the vicinity (as with arson or the use of explosives). To be included within the residual subclause, a predicate offense must "otherwise"—through some other conduct different from the conduct involved in the predicate offenses—create one or the other of these inherently dangerous circumstances. The conduct essential to commit failure-to-report escape creates neither.

Further, to determine whether an offense involves purposeful, violent and aggressive conduct, it is inappropriate to consider the potential for a violent confrontation with any law enforcement officials who may later seek to arrest the failure-to-report escapee. The conduct that must be purposeful, violent and aggressive is the conduct essential to commit the offense. That focus follows from the statutory text and is dictated by the categorical rule this Court has consistently applied. The purpose of the ACCA's sentencing enhancement also supports looking only to the conduct essential to commit the offense. The Act seeks to punish those whose criminal histories indicate that they have three times in the past demonstrated that they are willing to harm others to accomplish their plans, and thus are likely willing to do so again in the future. Because all offenses give

rise to a risk that law enforcement officials may seek later to arrest the offender, that possibility provides no way to distinguish among offenses. As a result, any inferences to be drawn about the likelihood of future willingness to harm others must be based upon conduct essential to commit the prior offense.

2. The residual subclause also should be limited to property crimes. All of the enumerated offenses target property: a burglar invades property, an extortionist seeks unlawfully to obtain property, and an arsonist or user of explosives unleashes a force that is inherently destructive of property. The structure of the two-clause definition of "violent felony" in the ACCA supports limiting the residual subclause to property crimes. Clause (i) expressly addresses crimes targeting persons, while clause (ii) addresses crimes targeting property that involve conduct that is also dangerous to persons, even though harm to persons may not be the object of the conduct. Indeed, if clause (ii) is not narrowed, and is read broadly to cover all purposeful, violent and aggressive crimes, including crimes targeting persons, then clause (ii) would swallow clause (i) in its entirety, rendering clause (i) superfluous. The drafting history of the ACCA confirms that Congress created clause (ii), including the residual subclause, to address property crimes that involve conduct that is inherently dangerous to persons.

3. Reading the residual subclause to cover only property crimes that involve purposeful, violent and aggressive conduct during the commission of the offense (*i.e.*, conduct that demonstrates that the offender is likely willing to harm others to carry out his plans) provides a standard which can be applied consistently by lower courts. Whether a crime targets property will often be easy to determine. And

requiring the crime to involve conduct that evinces an awareness of the prospect of violent confrontation, or that unleashes an inherently dangerous force, also meaningfully guides lower courts in evaluating whether predicate offenses are violent felonies. This approach also conforms with the decisions in *James* and *Begay*.

Any alternative approach rooted in the statistical likelihood of harm from a predicate offense would leave lower courts without meaningful standards to guide them. Data on the frequency of harm from the myriad offenses the government charges as predicate offenses often will be unavailable. Indeed, it is not even clear what frequency the ACCA would require to satisfy a numerical analysis because the government has produced no data demonstrating the *rate* of harm—the ratio of the number of incidents of harm and the number of occurrences of the crime—for the enumerated offenses. Courts cannot make reliable, consistent determinations when their standards require unknowable facts. To allow the ACCA's enhancement to turn on such standardless judgments would violate constitutional limitations on vague criminal laws and separation of powers.

4. Even if the numerical frequency of harm from a predicate offense remains a relevant consideration after *Begay*, there still would be no basis for concluding that failure-to-report escape is a "violent felony." The government has produced no data concerning the number of occasions that failure-to-report escape results in harm to others. Under neither of the numerical-based methods of applying the residual subclause proposed by members of this Court would it be possible to hazard anything more than a guess as to whether Congress intended to include failure-to-report escape within the scope of

the ACCA. Under these circumstances, the rule of lenity requires excluding the offense from the Act.

ARGUMENT

As this Court already has held, the residual subclause embraces only those offenses that are "similar" to the enumerated offenses. *Begay*, 128 S. Ct. at 1585. Offenses covered by the residual subclause are similar to the enumerated offenses in those respects pertinent to why Congress singled out the enumerated offenses as exemplars. *See Wash. State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffler*, 537 U.S. 371, 384 (2003) (the canon of statutory construction *ejusdem generis*, which applies where general words follow more specific terms, construes "general words [in a statute] to embrace only objects similar in nature to those objects enumerated by the preceding specific words") (internal quotation marks omitted).

There are two respects in which the enumerated crimes are exemplars of the kind of dangerous prior conduct that concerned Congress: (1) they involve purposeful, violent and aggressive conduct during the commission of the offense, in that they create certain circumstances that evince an offender's willingness to harm others to carry out his plan, and (2) they are property crimes. Only a crime similar to the enumerated offenses in *both* respects can be a "violent felony" within the meaning of the residual subclause. Although the crimes covered by the residual subclause will "otherwise" be different from the enumerated offenses, *Begay*, 128 S. Ct. at 1586 (stating that the word "otherwise" in the residual subclause "*can* ... refer to a crime that is similar to the listed examples in some respects but different in

others"), they must be similar in these respects. Failure-to-report escape is similar in neither respect.

I. FAILURE-TO-REPORT ESCAPE IS NOT A VIOLENT FELONY BECAUSE IT DOES NOT INVOLVE PURPOSEFUL, VIOLENT AND AGGRESSIVE CONDUCT.

The conduct involved in committing failure-to-report escape is not purposeful, violent and aggressive. The conduct essential to commit the offense involves riskless inaction. It is even less similar to the enumerated offenses than is driving under the influence.

A. The Inaction Essential To Commit Failure-To-Report Escape Is Too Unlike The Enumerated Offenses To Be A Violent Felony.

1. The most fundamental reason why failure-to-report escape cannot be a "violent felony" is that it involves *doing nothing*. Even driving under the influence typically involves some act that itself poses some degree of danger to others. *Id.* at 1588 (noting the "seriousness of the risks attached to driving under the influence"); *id.* at 1594 & nn.2, 3 (Alito, J., dissenting) (citing statistics on driving under the influence fatalities and injuries). But the same cannot be said of failure-to-report escape. The crime is committed by a *failure* to act. The moment the time to report passes, the crime has been committed. One could be traveling to the prison, perhaps delayed by traffic, at the time the crime is committed. *See* JA 91 (noting crime is committed even if offender is merely "an hour late"). The defendant could even be asleep at the time he commits the crime. Even if sleeping while committing failure-to-report escape is a "hypothesize[d] unusual case[]," it remains true that

in the "ordinary case" the "conduct encompassed by the elements of the offense," *see James*, 127 S. Ct. at 1597, is entirely innocuous. *Inaction* is the very antithesis of purposeful, violent and aggressive conduct. It cannot be the kind of conduct Congress had in mind when it sought to single out the most dangerous offenders for especially long sentences. *Begay*, 128 S. Ct. at 1588 (the Act targets those with "a prior record of violent and aggressive crimes committed intentionally").

In *Begay*, this Court emphasized that felony driving under the influence is a strict liability offense, and hence does not involve the kind of purposeful conduct at which the definition of "violent felony" aims. 128 S. Ct. at 1588. Even assuming that a crime that requires a mere *knowing* violation (rather than a *specific intent* to commit a crime) can satisfy *Begay*'s standard, the fact that failure-to-report escape involves *inaction* means it is even further afield than driving under the influence from the kind of purposeful, violent and aggressive conduct at which the ACCA aims.

2. Through the definition of "violent felony," Congress sought to identify those whose prior criminal conduct indicates that the offender is the sort of person who might later seek "deliberately to harm a victim." *Id.* at 1586.[4] Clause (i) covers those crimes that target harming an individual. 18 U.S.C.

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[4] An offender's criminal history is commonly used to identify a potential for future dangerousness. *See Almendarez-Torres* v. *United States*, 523 U.S. 224, 230 (1998) (noting that "prior commission of a serious crime ... is as typical a sentencing factor as one might imagine"); *Spencer* v. *Texas*, 385 U.S. 554, 571 (1967) (Warren, C.J., dissenting in two cases and concurring in a third) (offenders' "past conduct indicates their propensity to criminal behavior").

§ 924(e)(2)(B)(i) (a violent felony includes crimes that have "as an element the use, attempted use, or threatened use of physical force against the person of another"). Clause (ii) covers those offenses that, while not targeting harm to others, nonetheless create inherently dangerous circumstances that evince a willingness to harm others to carry out one's plan. As this Court emphasized, the Act is not concerned with those whose prior criminal histories reveal mere recklessness toward the risks of harm to others. *Begay*, 128 S. Ct. at 1587 (specifying that the crimes of recklessly tampering with consumer products, 18 U.S.C. § 1365(a), and inattention to duty by seamen causing serious accidents, *id.* § 1115, are not "violent felonies" within the meaning of the Act). It is the conscious awareness of the dangerous circumstances being created which supports the inference that the offender is likely willing to harm others to carry out his plans. The enumerated offenses were included as exemplars of just this sort of dangerous conduct.

As this Court recognized, Congress singled out burglary because it deemed the offense "inherently dangerous." *Taylor* v. *United States*, 495 U.S. 575, 585 (1990) (quoting *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. of the Judiciary*, 99th Cong. 15 (1986) ("House Hearing")). By *inherently* dangerous, this Court understood that Congress was focused on the dangers to others that arise "in the course of committing" burglary, House Hearing at 14, and specifically on the possibility of a confrontation between the offender and "people who might be inadvertently found on the premises." House Hearing at 26, *cited in Taylor*, 495 U.S. at 585; *James*, 127 S. Ct. at 1594-95 (stating that the possibility of confrontation during the commission of

a burglary is the "main risk" that explains why burglary was identified as a "violent felony" in the Act). The fact that a burglar carries out the crime with "awareness of th[e] possibility" that he may, in the process of committing the crime, find himself in a "violent confrontation" with "an occupant, caretaker, or some other person who comes to investigate" suggests "that he is prepared to use violence if necessary to carry out his plans or to escape." *Taylor*, 495 U.S. at 588.

Extortion, like burglary, is inherently dangerous in that the offender is consciously aware of the potential for a confrontation with another in the process of committing the crime, which suggests that he likely is prepared to harm another to carry out his plan. In fact, extortion often involves an *expressed* threat of physical harm to the person or the property of another. 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.4(a)(4) (2d ed. 2003) ("Virtually all of the [extortion] statutes cover threats to injure (i.e., to cause bodily harm to the person or to damage the property of) the victim or some other person."); Model Penal Code § 223.4 (2008) ("A person is guilty of theft [by extortion] if he purposely obtains property of another by threatening to ... inflict bodily injury on anyone ...."). It would be difficult to imagine a better indication that the offender is willing to harm another to carry out his plans. *James*, 127 S. Ct. at 1607 (Scalia, J., dissenting) (observing that "[t]he extortionist ... has already expressed his willingness to commit a violent act").

The conduct involved in committing arson and crimes involving the use of explosives is inherently dangerous for a more obvious reason. The conduct involved in committing those crimes *necessarily* exposes others in the vicinity to dangerous

circumstances. House Hearing at 23 ("offenses like arson or the use of explosives" are "activities which pose severe inherent danger to human life even if the property [targeted] is believed to be unoccupied") (statement of Mr. Knapp). This is precisely the kind of conduct that tort law has long recognized is "inherently dangerous," and has singled out for a heightened degree of responsibility because "harms ... are more or less inevitably associated with" the use of explosives. 2 Dan B. Dobbs, *The Law of Torts* § 346, at 950 (2001). As the government has recognized, "arson and explosives use ... present[] a risk of injury to others by exposing the public to an inherently dangerous activity." Brief of the United States at 19, *Begay* v. *United States*, No. 06-11543 (U.S. filed Dec. 3, 2007) ("U.S. *Begay* Brief").

In sum, with arson and use of explosives, the offender undertakes conduct that unleashes a force that is necessarily harmful to any individuals who may be in the vicinity. With burglary and extortion, the conduct gives rise to such a substantial risk of confrontation that the offender may be deemed aware of that risk, thus indicating that he likely would be willing to harm another to carry out his plans. The enumerated offenses thus all involve inherently dangerous conduct. As the government itself has argued, the Act is concerned with prior convictions involving conduct that "put[s] the public at risk, and ... demonstrate[s] that [the offender has] little regard for the safety and well being of others." *Id.* at 34.

The conduct necessary to commit failure-to-report escape tells us nothing about the offender's regard for the safety of others. It is not inherently dangerous in any sense. Unlike arson or the use of explosives, nothing in the conduct necessary to commit failure-

to-report escape directly exposes the public to a necessarily harmful force. And, unlike either burglary or extortion, nothing in the conduct necessary to commit failure-to-report escape gives rise to a risk of confrontation in its commission such that one could conclude that the offender likely would use violence to carry out his plans. Because the offense is committed by *inaction*, there is no risk of confrontation during its commission. The commission of the crime is all but risk-free.

B. Any Possibility That Harm To Others Could Occur If Law Enforcement Officials Attempt To Arrest A Failure-To-Report Escapee Does Not Transform The Crime Into A Violent Felony.

Neither the lower courts nor the government have, as yet, argued that the conduct encompassed by the elements of failure-to-report escape creates *any* risk of harm to others. The risk of harm, it has been argued, arises from the potential for violence during any effort at subsequent recapture by law enforcement. In an oft-quoted passage, the Tenth Circuit reasoned that

> every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so. A defendant who *escapes from a jail* is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant *escapes from a jail* by stealth and injures no one in the process, there is still a serious potential risk that injury will

> result when officers find the defendant and attempt to place him in custody.

United States v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (second and third emphases added) (internal citation omitted). Even though, by its terms, this reasoning applied only to those who escape from a secure penal institution, courts (like the Seventh Circuit) have extended its reasoning to those offenders, like petitioner, who merely failed to report to a penal institution, or, similarly, failed to return from a work-release program, halfway house, or comparable setting where they were not subject to any physical constraint. Pet. 9-11 (citing cases). That extension cannot withstand scrutiny, especially in light of *Begay*.

1. To determine whether escape is a "violent felony" it is wrong to look to any risk of harm that arises when law enforcement officials attempt to recapture an escapee. The conduct that must be purposeful, violent and aggressive for a predicate crime to be a "violent felony" is "the conduct encompassed by the elements of the offense." *James*, 127 S. Ct. at 1597; *Begay*, 128 S. Ct. at 1584 (emphasizing that courts should "consider the offense generically, that is to say ... in terms of how the law defines the offense"). As *Begay* recognized, a focus on the conduct essential to commit the offense is dictated by this Court's long-established "categorical" approach to the ACCA's "violent felony" provision. 128 S. Ct. at 1584 (citing *Taylor*, 495 U.S. at 602).

Requiring the purposeful, violent and aggressive conduct to relate to the conduct essential to commit the offense finds support in the text of the ACCA and its recognized purpose. By the terms of the Act, the "conduct" "involve[d]" in the crime must be what "presents a serious potential risk of physical injury to

another." 18 U.S.C. § 924(e)(2)(B)(ii). And, as discussed above, the purpose of the enhanced penalty provision of the ACCA is to single out those individuals whose criminal histories reveal not just "a degree of callousness toward risk," but also a willingness to engage in certain conduct under circumstances where the risk of harm to others is consciously known. *Begay*, 128 S. Ct. at 1587; *Taylor*, 495 U.S. at 588. The enumerated offenses indicate that Congress was focused on the dangers that inhere in the conduct essential to commit the offense. *Taylor*, 495 U.S. at 590.

In short, the conduct essential to commit the offense tells us what we need to know about the offender's willingness to harm others. As the government has argued, no "'subsequent volitional choice (only tangentially related to the offense...)'" should be considered to indicate the offender's willingness to cause harm to another. U.S. *Begay* Brief at 21 (explaining why felon-in-possession is not a violent felony under the ACCA) (quoting *United States* v. *Rutherford*, 54 F.3d 370, 377 n.15 (7th Cir. 1995)). That is, a court should not look beyond the conduct essential to commit the offense and impute to the offender a willingness subsequently to act dangerously. If the conduct encompassed by the elements of the offense does not indicate the offender's willingness to harm others, then the offense is not a "violent felony."

2. If courts were permitted to consider the potential for a violent confrontation arising out of a later attempt to arrest an offender by law enforcement, then the ACCA's residual subclause would transform all offenses into violent felonies. *Every* crime involves some risk of confrontation between law enforcement and the offender during

any subsequent effort to arrest the offender. And *every* such confrontation potentially could turn violent. If that risk alone were sufficient to treat an offense as a "violent felony" under the ACCA, then even purely financial felonies would be violent felonies. Even a financial crime of inaction, like Internal Revenue Code § 7202, 26 U.S.C. § 7202, which makes it a felony willfully to fail to collect or pay over taxes subject to withholding, would become a "violent felony." Likewise, the ACCA would extend to a failure-to-report financial crime like the willful failure to report various monetary transactions. *See* 31 U.S.C. §§ 5313, 5316 & 5322(a). No felony would escape the reach of the Act.

Any approach to the definition of "violent felony" that would sweep all crimes within its ambit must be wrong. *See United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994) (rejecting interpretation of statute that "would produce results that were not merely odd, but positively absurd"). We know from the Act's lengthy drafting history that Congress struggled over the proper way to define the scope of the Act. *See Taylor*, 495 U.S. at 582-84 (enumerating the multiple iterations of the predicate offense definition). A reading of the Act that treated any kind of escape as a "violent felony" simply because of the risk of confrontation with law enforcement *after* the escape occurred would render pointless the entire congressional enterprise of defining the term "violent felony." Such a reading must be wrong. *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. We are thus reluctant to treat statutory terms as surplusage in any setting. We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme ....") (internal quotation

marks, alteration and citations omitted); *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 (2004) (rejecting an interpretation of crime of violence under 18 U.S.C. § 16 that would leave a portion of the definition "practically devoid of significance").

The definition of "violent felony" retains its meaning as a limitation on the scope of the ACCA's sentencing enhancement when the risk of harm to others remains focused on what occurs *during the commission of the offense*. Ultimately, what matters is what can be inferred about the individual who engages in the conduct necessary to commit the underlying offense. If his past conduct indicates a willingness to put himself in a position where he may need to harm others to carry out his plans, it is fair to conclude that in the future he would be the sort of dangerous individual who might "deliberately point [a] gun and pull the trigger." *Begay*, 128 S. Ct. at 1587. On the other hand, if the conduct necessary to commit the offense does not evince a willingness to harm others, then there is no basis for drawing the inference of future dangerousness.[5]

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[5] Whether custodial escape, *i.e.*, escape from physical constraints, is a "violent felony" is not the question before the Court. But whatever one concludes regarding custodial escape, there can be no doubt that the conduct essential to commit failure-to-report escape is less *inherently* dangerous than that of custodial escape. Custodial escape at least potentially involves a willingness to break free from physical constraints, and thus at least arguably evinces an awareness of the risk of confrontation with another in the course of committing the offense and a willingness to use violence if necessary to carry out one's plans. The same cannot be said of failure-to-report escape. It is completed before the possibility of confrontation even arises. No member of the public or law enforcement official in the presence of the offender would even be aware that, merely due to the passage of time, the offender has just committed a crime.

3. Although some states (including Illinois, *see People* v. *Miller*, 509 N.E.2d 807, 809 (Ill. App. Ct. 1987)), and federal law, *see United States* v. *Bailey*, 444 U.S. 394, 413 (1980), treat all escapes as "continuing" offenses, that designation, which is not uniform across all jurisdictions,[6] does not inform the inquiry here. Whether a state chooses to treat escape as a "continuing offense" does not change the conduct essential to commit the crime.[7] In Illinois, Colorado and Vermont, where the offense is continuing, the offender need do nothing more or less to commit failure-to-report escape than an offender in Florida, Michigan and Texas, where the offense is not continuing. Whether the offense is deemed "continuing" or not, there is still no basis to conclude that the offender is the sort of individual who has in the past and would in the future disregard the safety of others. Continuing to fail to report is no more indicative of a willingness to use violence and harm others than is initially failing to report.

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[6] *Compare, e.g.*, Colorado (Colo. Rev. Stat. § 18-8-201(2)), New Mexico (*State* v. *Martinez*, 781 P.2d 306, 309 (N.M. Ct. App. 1989)), *and* Vermont (*State* v. *Lewis*, 711 A.2d 669, 671-72 (Vt. 1998)), which treat escape as a continuing offense, *with, e.g.*, Florida (*Gaskin* v. *State*, 869 So. 2d 646, 647 (Fla. Dist. Ct. App. 2004)), Michigan (*People* v. *Mendoza*, 310 N.W.2d 860, 863-64 (Mich. Ct. App. 1981)), *and* Texas (*Spakes* v. *State*, 913 S.W.2d 597, 598 n.* (Tex. Crim. App. 1996) (per curiam)), which do not.

[7] The purposes of designating a crime a continuing offense include extending the statute of limitations, *see Toussie* v. *United States*, 397 U.S. 112, 121 (1970), making it possible to try the defendant in any venue where he may be found, *see United States* v. *Portillo-Vega*, 478 F.3d 1194, 1201 & n.9 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1442 (2008), and defeating a defense of duress or necessity (by requiring the defendant to return to custody as soon as the basis of his duress or necessity defense ends), *see Bailey*, 444 U.S. at 415.

Finally, the relative ease with which escape can be detected after it is achieved should play no role in determining whether any escape, much less failure-to-report escape, is a violent felony. It may be true that a prison or halfway house official is likely to notice the absence of an inmate or resident. But the *only* reason the likelihood of detection would even arguably be relevant is the potentially increased likelihood that law enforcement will be dispatched to track down the escapee, thus creating the possibility of a confrontation with law enforcement officials. For the reasons discussed above, that possibility is not the kind of potential for harm to which the ACCA is addressed. *Supra* at 21-23.

And even if it were relevant, that possibility *alone* could not be sufficient to warrant treating failure-to-report escape as a violent felony. First, it would be necessary to assess the likelihood that law enforcement would, in fact, be dispatched to track the escapee down. Even assuming that law enforcement officials would typically expend great effort to find a custodial escapee, it is far less urgent to locate an escapee who already enjoys substantial (yet incomplete) freedom to move about the community.[8]

For similar reasons, there is no reason to conclude that even *if* law enforcement officials were to seek to recapture a failure-to-report escapee, any such confrontation would produce violence or harm to anyone. That is because, as discussed above, *supra* at 20-21, what little one knows about a failure-to-report escapee from the conduct necessary to commit the offense provides no reason to believe he has used or

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[8] There is no indication in the record that anyone was dispatched to find petitioner on any of the four occasions he failed to report.

would use violence in the future. Nothing about the commission of, for example, the financial failure-to-report crimes identified above demonstrate an offender's indifference to the physical safety of others. Likewise, nothing about an offender's commission of failure-to-report escape demonstrates his indifference to the physical safety of others. When the conduct necessary to commit the offense itself provides no reason to believe that the offender has ever used force or even contemplated doing so to carry out his plans, there is no basis to believe the offender would use force in the future, even to defeat arrest for his offense.[9]

Indeed, to the extent we know anything at all about the likelihood of a failure-to-report escapee to behave violently, we have reason to believe it is relatively low. After all, we know from the fact that the offender was, at the time of his offense, permitted to move freely about the community that he was not considered to be dangerous enough to warrant secure confinement. In Illinois, criminal court judges routinely make public safety determinations when considering whether an offender should be released on his own recognizance or be permitted to post bail prior to trial. 725 Ill. Comp. Stat. 5/110-2 (requiring judge to consider whether the accused poses a "danger to any person or the community" in determining whether to allow individual released on own recognizance); *id.* 5/110-4 (for bailable offenses,

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[9] For this reason, any effort to distract from the conduct essential to commit the offense, and to focus on the possibility of later confrontation with law enforcement, ultimately fails. In the end, one must refer back to the conduct essential to commit the offense, and to identify purposeful, violent and aggressive conduct that inheres in those acts, to learn about the offender's willingness to use violence and harm others.

as to which a sentence of imprisonment is mandatory upon conviction, requiring judge to consider whether the accused poses a "real and present threat to the physical safety of any person or persons" in deciding whether to grant bail). There is no reason to believe that, in the exercise of a state criminal judge's sentencing discretion, *see* 730 Ill. Comp. Stat. 5/5-7-1 (describing authority to impose sentence of periodic imprisonment), public safety considerations go ignored in determining who will be permitted to serve a sentence of periodic confinement or work-release, as opposed to secure confinement. The fact that one of the few things we know about the failure-to-report escapee is that some public official determined that he need not be placed in secure custody undermines any basis for concluding that failure-to-report escape is a violent felony under the ACCA.

II. FAILURE-TO-REPORT ESCAPE IS NOT A VIOLENT FELONY BECAUSE IT IS NOT A PROPERTY CRIME.

Because the conduct essential to commit failure-to-report escape is not purposeful, violent and aggressive, the offense is not a violent felony under the ACCA. On that basis alone, this Court may reverse the Seventh Circuit's contrary judgment. In addition, failure-to-report escape is not a "violent felony" because it is not a property crime.

This Court has recognized that the crimes covered by clause (ii) are property crimes: "Congress sought to ... defin[e the term 'violent felony'] to include both crimes against the person (clause (i)) and certain physically risky crimes against property (clause (ii))." *Begay*, 128 S. Ct. at 1586. That view is supported by the text and structure of the ACCA, along with the Act's drafting history, all of which make clear that

the residual subclause is aimed only at crimes that target property.

A. The Residual Subclause Of The ACCA Encompasses Only Crimes Targeting Property.

Limiting the residual subclause to property crimes is necessary to prevent it from rendering clause (i) of the definition of violent felony superfluous. The limitation is suggested by Congress's decision to place the residual subclause in the same clause (ii) as the enumerated offenses (all of which are themselves crimes targeting property), rather than in its own clause (iii). Finally, the drafting history strongly supports what the text and structure themselves dictate: that clause (ii) covers only crimes targeting property.

1. If the residual subclause covered *all* crimes that involve purposeful, violent and aggressive conduct, then clause (i) would be rendered superfluous. Clause (i) covers crimes that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Every time an offender uses, attempts to use, or threatens to use physical force against another person, he is engaging in purposeful, violent and aggressive conduct. Therefore, if the residual subclause is not limited in some further way, it would swallow all the crimes that could potentially be covered by clause (i). *See Begay*, 128 S. Ct. at 1585 (stating "if Congress meant clause (ii) to include *all* risky crimes, why would it have included clause (i)," and noting that a broad interpretation of the residual subclause would seem to sweep the crimes described in clause (i) within the scope of clause (ii)).

It is a well settled principle of statutory interpretation that words in a statute should not be read to render other provisions mere surplusage. *Duncan*, 533 U.S. at 174; *Leocal*, 543 U.S. at 12; *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988). That principle has special force here, where the two provisions at issue are both parts of a single, comprehensive definition of a critical term in the statute. While the principle against rendering a statutory provision superfluous *can* give way to other competing considerations, *see Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 299 n.1 (2006) (accepting a potentially "superfluous" reading of statute where alternative would clearly contradict other language in the act); *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004) (concluding that it is "inappropriate" to "apply[] the rule against surplusage" when it will render a statute "ambiguous"), it would simply make no sense here to read one part of the definition of a term in a statute to swallow the other. *Leocal*, 543 U.S. at 12 (refusing to read one provision of a statutory definition to fully "encompass" another). Therefore, the scope of the residual subclause must be limited to some subset of all crimes that involve purposeful, violent and aggressive conduct.

Clause (ii)'s enumerated offenses shed light on the trait that distinguishes the residual subclause, and all of clause (ii), from the crimes covered by clause (i): all of the enumerated offenses are crimes targeting property. One who commits burglary seeks to invade some building or structure. *Taylor*, 495 U.S. at 598. Extortion is a form of theft, *i.e.*, its aim is to obtain money through some threat. Model Penal Code § 223.4; *James*, 127 S. Ct. at 1606 (Scalia, J., dissenting). Arson is causing a fire or explosion aimed

at a "building" or other "property." Model Penal Code § 220.1(1) (2008); 3 LaFave, *supra* § 21.3(c), at 247-48. And crimes involving the use of explosives necessarily risk damaging any property in the vicinity of the explosion. *See Spano* v. *Perini Corp.*, 250 N.E.2d 31, 35 (N.Y. 1969) (noting in the context of legal use of explosives that "blasting involves a substantial risk of harm no matter the degree of care exercised, we perceive no reason for ever permitting a person who engaged in such an activity to impose this risk upon nearby persons or property without assuming responsibility therefor"); 2 Dobbs, *supra* § 348, at 955 (noting that because of the particular risks posed, strict liability for explosives extends even so far as "vibration damage to property").

Clause (ii)'s focus on property crimes makes sense in light of the subject of clause (i). Clause (i) expressly covers crimes targeting persons. 18 U.S.C. § 924(e)(2)(B)(i) (covering crimes involving "physical force against the person of another").[10] But Congress recognized that the potential of armed career criminals to cause harm to others occurs not only when the offender targets another, but also when such an offender targets property. House Hearing at

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[10] This is not to say that the definition in clause (i) excludes property crimes that also target persons. For example, robbery, which has as an element the use of force against another, Model Penal Code § 222.1 (2008), targets both persons and property (and would, therefore, be included under either clause). The rule against surplusage is not offended if some crimes fall into both categories, so long as there are also some crimes in each category that do not fall into the other. *James*, 127 S. Ct. at 1606 (Scalia, J., dissenting); *United States* v. *Atl. Research Corp.*, 127 S. Ct. 2331, 2337 (2007) ("It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.").

26 (testimony of Mr. Knapp); *James*, 127 S. Ct. at 1594 (stating that "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party").

That Congress included the residual subclause within clause (ii) shows that it does not cover crimes beyond the property crimes addressed in clause (ii). If Congress had intended to address risky crimes beyond those targeting persons (clause (i)) and property (clause (ii)), then it could have placed a residual provision in a clause (iii). Instead, Congress chose to include only two basic categories of offenses within the definition of violent felony: those targeting persons and those targeting property.

2. The textual and structural reading of the Act is amply confirmed by the Act's drafting history. As this Court has repeatedly recounted, the two-clause definition of "violent felony" in the ACCA was the product of congressional deliberation over how to expand the predicate violent-felony offenses under the ACCA from the original two offenses (robbery and burglary), *see* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185 (repealed 1986), to both crimes against persons and a broader array of crimes against property. *See Begay*, 128 S. Ct. at 1585-86; *Taylor*, 495 U.S. at 581-89.

The two-clause definition of violent felony emerged from two distinct bills, one introduced in the Senate and one in the House. *Taylor*, 495 U.S. at 583. The Senate bill defined "crime of violence" broadly, and left no doubt that crimes targeting both property and persons would be included. *See* S. 2312, 99th Cong.

(1986).[11] The House bill, by contrast, would not have covered crimes against property, except to the extent such crimes also have, as an element, the use, attempted use or threatened use of physical force against the person of another. H.R. 4768, 99th Cong. (1986).

The House devoted substantial attention to whether and how to include crimes "against *property* ... in the definition of 'violent felony.'" H.R. Rep. No. 99-849, at 3 (1986). The language now reflected in the residual subclause emerged out of that debate. *Id.* (stating that agreed solution to "major question" regarding inclusion of property crimes was "to add ... crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others").

The bill introducing the language that ultimately became the residual subclause contained two clauses defining "violent felony" (as in the final version). The first (addressed to crimes against persons) was adopted verbatim as clause (i). *See* H.R. 4885, 99th Cong. (1986). However, the second clause, as introduced, contained only what became the residual subclause; it had no enumerated offenses. *Id.* Yet the House Report explains that the second clause is directed at dangerous property crimes, stating that it "adds all State and Federal felonies *against property* such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the

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[11] The Senate bill would have covered all crimes, not just felonies, which have as an element "the use, attempted use, or threatened use of force against either the person or property of another," in addition to felonies that involve "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." S. 2312.

conduct involved presents a serious risk of injury to a person." H.R. Rep. No. 99-849, at 5.

In the final version, Congress inserted the enumerated offenses (and the word "otherwise") in front of the residual subclause in clause (ii). The enumerated offenses were added without comment by any member of any committee and were unaccompanied by any new report. *See* H.R. 5484, 99th Cong. (1986); 132 Cong. Rec. H9479, H9495 (daily ed. Oct. 8, 1986) (first version of the bill introducing enumerated offenses). Still, the enumerated offenses are precisely those offenses that the House Report, which had introduced the language that ultimately became the residual subclause, indicated were the kinds of *property* crimes that the general language was intended to cover. *Compare* H.R. Rep. No. 99-849, at 5, *with* 18 U.S.C. § 924(e)(2)(B)(ii).

In sum, the drafting history of the ACCA reveals that (1) Congress was focused on which property crimes should be included as "violent felonies," (2) the residual subclause was drafted to define the scope of *property* crimes that should be covered before any enumerated offenses were included in the text, and (3) the enumerated offenses, along with the word "otherwise," were added without any indication that their inclusion would expand the subject-matter of the clause: dangerous property offenses.

B. Failure-To-Report Escape Is Not A Property Crime.

In light of the ACCA's text, structure, and drafting history, the residual subclause should be read to cover only property crimes. Failure-to-report escape is not a property crime. Nothing in the conduct essential to commit the offense has anything to do

with invading, unlawfully obtaining or causing damage to any property. It is, therefore, not a "violent felony" within the meaning of the residual subclause.

III. LIMITING THE RESIDUAL SUBCLAUSE TO PROPERTY CRIMES THAT INVOLVE PURPOSEFUL, VIOLENT AND AGGRESSIVE CONDUCT DURING THE COMMISSION OF THE OFFENSE PROMOTES CONSISTENT APPLICATION OF THE ACCA IN FUTURE CASES.

The residual subclause covers only property crimes that involve purposeful, violent and aggressive conduct—*i.e.*, conduct that evinces a likely willingness to harm others—during the commission of the offense. That reading best fits the text, structure, drafting history, and purpose of the Act, as well as this Court's decisions in *James* and *Begay*. In addition, that standard provides the most promise for consistent application of the ACCA in future cases. The administrability of the standard is an additional reason to adopt it.

1. To begin, limiting the residual subclause to property crimes—*i.e.*, those involving the physical invasion or unlawful acquisition of property, or conduct that necessarily would damage property—draws reasonably clear distinctions among offenses. It will often be a straightforward matter to determine whether the elements of the offense involve conduct that seeks physically to invade property or unlawfully to acquire property from another. Determining whether the elements of an offense involve the release of a force (such as fire or an explosion) that necessarily would damage property is equally straightforward. There is no need to look beyond the elements of the offense for any *quantitative* data that may or may not exist. And even the degree of

qualitative judgment that must be brought to bear is reduced to a minimum.

With respect to determining whether an offense entails purposeful, violent and aggressive conduct demonstrating a likely willingness to harm others, some degree of *qualitative* judgment is unavoidable. Still, this standard also does not depend on (often unavailable) historical data. And the qualitative judgment is guided by the enumerated offenses, which indicate the circumstances that present a risk of harm to another with which the Act is concerned. *See supra* at 16-18 (discussing how burglary and extortion present a risk of confrontation and how arson and use of explosives risk harm to others by unleashing an inherently harmful force).

These two steps—examining whether the predicate offense is (1) a property crime that (2) involves purposeful, violent and aggressive conduct during the commission of the offense—combine to resolve the problem of how to determine whether a crime that is not "analogous" to one of the enumerated offenses should be considered a "violent felony" under the residual subclause. *See James*, 127 S. Ct. 1598 (discussing problem); *id.* at 1601 (Scalia, J., concurring) (same). Once one accepts, as this Court has, that the residual subclause includes *only* crimes that are "similar" in certain respects to the enumerated offenses, *Begay*, 128 S. Ct. at 1584-85, the question of what to do with "nonanaloguous" crimes vanishes. If a crime is not analogous *in the respects that matter*, then the crime is not included within the residual subclause. If the crime is analogous in those respects, then the offense is included.

This approach comports with how this Court resolved both *Begay* and *James*. In *Begay*, this Court

concluded that driving under the influence was not similar to the enumerated offenses because it was a "strict liability" offense. *Id.* at 1588. That is to say, the offense was not analogous to the enumerated offenses in a relevant respect: it "differs from a prior record of violent and aggressive crimes committed intentionally." *Id.*

By contrast, in *James*, this Court concluded that attempted burglary in Florida was analogous in the relevant respects. *James* discussed what about the conduct essential to commit burglary creates a risk of harm to another. 127 S. Ct. at 1594-95. This Court focused on the dangerous circumstances created by that conduct—namely, creating the "possibility of a face-to-face confrontation between the burglar and a third party." *Id.* The opinion does not inquire into the likelihood that harm actually would occur. Rather, it focuses on whether the predicate offense presents the same likelihood of a *confrontation*. This Court concluded that the conduct essential to commit attempted burglary in Florida was analogous to burglary in this respect—both crimes equally create the circumstances that could produce a confrontation, demonstrating that the offender is likely willing to harm others to carry out his plans. *Id.* at 1595-96.

Significantly, the state supreme court had made clear that attempted burglary is a property crime in Florida. As this Court observed, in Florida attempted burglary requires "'an overt act directed toward entering or remaining in a structure or conveyance.'" *Id.* at 1594 (quoting *Jones* v. *State*, 608 So.2d 797, 799 (Fla. 1992)). The conduct encompassed by the elements of attempted burglary in Florida thus involves seeking to invade another's property. This was important to the outcome in *James*, as the Court noted that attempted burglary may not be a violent

felony in those states where the conduct encompassed by the elements of the offense amounts to mere preparation (such as "casing" the building), and does not seek to invade the property of another. *James*, 127 S. Ct. at 1595-96 & n.4.

Petitioner does not contend that his approach will eliminate all the difficulties that can arise in applying the Act. Hard cases likely remain. But petitioner submits that his approach reflects an improvement that will promote the consistent resolution of a great many cases that might otherwise prove difficult and controversial. *Id.* at 1602 (Scalia, J., dissenting) (aspiring to an interpretation of the residual subclause that is "better" even if not "an all-encompassing solution").

2. This Court should seize the opportunity to provide the most thorough guidance to lower courts applying the ACCA (and its corresponding guidelines provision). This is the third case in as many terms in which this Court has agreed to interpret the residual subclause. As members of this Court have observed, efforts to interpret the residual subclause, thus far, have failed to produce a standard that can consistently be applied to the numerous potential predicate crimes that the government seeks to sweep within its scope. *Begay*, 128 S. Ct. at 1585 (observing that the lack of clarity with respect to the degree of risk posed by the enumerated offenses makes it "difficult to accept" that Congress intended the residual subclause to be interpreted as covering all crimes that pose a comparable degree of risk); *James*, 127 S. Ct. at 1598 (suggesting, but not deciding, that the degree of risk posed by crimes covered by the residual subclause may be less than the risk posed by any of the enumerated offenses). In *James*, the Court compared what it perceived to be the relative risks of

burglary and attempted burglary, and concluded that attempted burglary was at least as risky as completed burglary. *Id.* at 1594-96. The dissent, examining precisely the same question, reached the opposite conclusion. *Id.* at 1607-08 (Scalia, J., dissenting). In *Begay*, the concurring and dissenting opinions both focused exclusively on the degree of risk posed by driving under the influence in their respective efforts to determine whether that offense is a "violent felony," and, once again, reached opposite conclusions. *Begay*, 128 S. Ct. 1591-92 (Scalia, J., concurring) (applying the rule of lenity because the government had not provided sufficient data to determine the degree of risk of driving under the influence); *id.* at 1592-94, (Alito, J., dissenting).

These divergent approaches inevitably would be reproduced by the lower courts if this Court were to look to the statistical degree of risk of a predicate offense to determine whether it is a "violent felony." Many, perhaps most, of the predicate crimes that the government seeks to sweep within the ACCA will be asserted in the absence of any data indicating even the number of incidents of harm that occurred as a result of the commission of the offense. *See id.* at 1593 & nn.2, 3 (Alito, J., dissenting) (producing statistics regarding number of alcohol related accidents, along with number of deaths and injuries reported therefrom). Even less frequently will the courts have at their disposal the *rate* of harm, *i.e.*, the ratio of the number of times harm to another resulted and the number of total occurrences of the crime. This is significant because "[w]here the issue is 'risk,' the annual number of injuries from an activity must be compared with annual incidents of the activity." *Id.* at 1591 (Scalia, J., concurring).

Because the government continues to press the ACCA's substantial sentence enhancement into service, lower courts cannot avoid reaching *some* conclusion in the face of critical uncertainty were this Court to require a focus on the degree of risk of the predicate crime.[12] *James*, 127 S. Ct. at 1608 (Scalia, J., dissenting) (describing this as "an imponderable that cannot be avoided"). As Judge Posner observed below, "it is an embarrassment to the law when judges base decisions of consequence on conjectures." JA 93.

If anything, Judge Posner understated the point. It is more than embarrassing when the application of a criminal provision that determines the permissible range of sentence is left to judicial "conjecture." It is unconstitutional for Congress to permit courts to determine an offender's eligibility for criminal punishment on the basis of standardless, *ad hoc* judgments by trial courts.

First, a rule that permits judges to impose criminal punishment based on their speculation regarding the degree of risk presented by a predicate offense would

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[12] The issue arises not only when the government chooses to enhance a felon-in-possession sentence pursuant to the ACCA. The Sentencing Guidelines also permit application of a "career offender" enhancement based on a guideline that is substantively identical to the definition of "violent felony" in the ACCA. *See* U.S.S.G. § 4B1.2. In addition, there is an "armed career criminal" Guideline that expressly incorporates the ACCA. *See* U.S.S.G. § 4B1.4. In 2007 alone, the government successfully sought an enhancement under the armed career criminal *guideline* enhancement 656 times. U.S. Sentencing Comm'n, *2007 Sourcebook of Federal Sentencing Statistics* tbl.22 (2007). That figure is up from the 292 applications of the enhancement in 2002, just five years earlier. U.S. Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics* tbl.22 (2002).

be void for vagueness. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974) ("Due process requires that all be informed as to what the State commands and forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law.") (internal quotation marks and citation omitted). If either the *number* of injuries to another that occur as a result of the conduct involved in failure-to-report escape or the *rate* of such injuries are the facts upon which petitioner's eligibility for the ACCA enhancement turns, then there was no way petitioner could have understood that he was eligible for the enhancement. The fact is that *nobody*, not even the government, knows what those numbers are. The lack of notice regarding the determining factor precludes a judge from speculating that the factor has, in fact, been satisfied.

Permitting judges to impose punishment based on their uninformed, standardless sense of the degree of risk posed by failure-to-report escape, or any other predicate crime with respect to which there is no data, also would violate separation of powers. "[D]efining crimes and fixing penalties are legislative, not judicial, functions." *United States* v. *Evans*, 333 U.S. 483, 486 (1948); *Ex parte United States*, 242 U.S. 27, 41-42 (1916) ("the authority to define and fix the punishment for a crime is legislative"). When a judge, without the benefit of statistical information, simply speculates that the degree of risk of harm is

sufficient, he or she is making law rather than applying it, contrary to the separation of powers.

Because the standard proposed by petitioner meaningfully guides lower courts, it avoids the constitutional concerns raised by an exclusive focus on the (often unknowable) number or rate of incidences of harm to another caused by any particular predicate crime. *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) ("when an act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'").[13] This Court should adopt it.

IV. EVEN IF THE DEGREE OF RISK OF HARM PLAYS SOME ROLE IN DETERMINING WHAT IS A "VIOLENT FELONY," THE ABSENCE OF ANY DATA REGARDING THE RISK EXCLUDES FAILURE-TO-REPORT ESCAPE FROM THE ACCA.

This Court only last term rejected a standard based exclusively on the "degree of risk" posed by the enumerated offenses and the predicate offense. *Begay*, 128 S. Ct. at 1585. The principle of *stare decisis* has special force in cases, like this one, involving the interpretation of a statute. *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 756-57 (2008) ("*[S]tare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done.") (internal quotation marks omitted). But even if the Court continues to

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[13] Another possible way to avoid these constitutional concerns would be the routine, widespread application of the rule of lenity to putative predicate crimes regarding which there is no meaningful data on frequency of harm to others. *See* Argument IV, *infra*.

require some numerical basis to believe that a predicate offense "presents a serious potential risk of harm to another," failure-to-report escape *still* would not be a "violent felony."

The concurring and dissenting opinions in *Begay* offer competing versions of a numerical approach to the residual subclause. The concurrence takes the view that the rate of harm to others from the predicate offense (the number of incidences of harm compared with the number of incidences of the offense) must be at least as high as the rate of harm to others from the least risky enumerated offense. *Begay*, 128 S. Ct. at 1589 (Scalia, J., concurring). The dissent rejects both looking to the *rate* of harm for the predicate offense, and treating the risk of harm from any of the enumerated offenses as a baseline against which the risk of harm from the predicate offense is compared. *Id.* at 1596-97 (Alito, J., dissenting). For the dissent, it is sufficient that a large number of deaths result each year from the conduct involved in the offense, *id.* at 1593 nn.2, 3 (Alito, J., dissenting), and that, in light of that fact, the activity has a large number of "potential victims" and can be said to be a "severe societal problem in large measure because of the very large number of victims it produces each year," *id.* at 1596 (Alito, J., dissenting).

Even if either or both of these sets of numerical considerations were applied, exclusively or in part, there would be no basis to conclude that failure-to-report escape is a "violent felony." As discussed above, the government has produced no data identifying even the number of incidences of harm that result from the conduct essential to commit failure-to-report escape. The absence of such data certainly precludes any way of determining, as per the *Begay* concurrence, the *rate* of harm to others

from the conduct. It likewise precludes drawing any conclusions, as per the *Begay* dissent, about either the number of "potential victims" who are exposed to any danger or whether failure-to-report escape is a "severe societal problem."

The rule of lenity prevents this Court from "interpret[ing] a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958); *Begay*, 128 S. Ct. at 1592 (Scalia, J., concurring). Here, there is ample reason to believe that Congress did not intend to enhance the punishment of a felon in possession based on any prior convictions for failure-to-report escape. In addition, it is surely the case that, under any standard advocated by any member of this Court, sweeping failure-to-report escape within the scope of the residual subclause would amount to "no more than a guess as to what Congress intended."

The "venerable" rule of lenity

> not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion). Petitioner should not be subjected to enhanced punishment based on an uncertain application of the ACCA to failure-to-report escape. If Congress wishes to widen the scope of the Act, it, of course, remains free to do so.

CONCLUSION

The judgment of the court of appeals should be reversed.

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July 30, 2008

109 (7)
No. 06-11206
Supreme Court, U.S.
FILED
OCT 24 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF THE PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF

To determine whether a prior offense is a "violent felony," the ACCA directs a focus on the "conduct" "involve[d]" in committing the offense. 18 U.S.C. § 924(e)(2)(B)(ii). This Court's decision in *Begay* v. *United States* followed that direction, and concluded that the conduct involved in committing the offense must be "purposeful, violent and aggressive." 128 S. Ct. 1581, 1586-87 (2008).

The government goes to great lengths to ignore the conduct encompassed by the elements of failure-to-report escape. The government cannot point to any violent or aggressive act involved in committing the offense. To the extent the government even attempts to identify the conduct involved in committing failure-to-report escape, it refers to the "offender's deliberate decision not to report to prison." U.S. Br. 27; *see also id.* at 28 (suggesting that the conduct is "a conscious decision to achieve [a] result"). But a "deliberate decision" is thought, not conduct. And even if it were conduct, a "deliberate decision" is neither violent nor aggressive.

Rather than focus on the conduct encompassed by the elements of failure-to-report escape, the government argues that the offense is violent and aggressive because dangerous circumstances are created by the commission of the offense, *plus* the decision of law enforcement to prioritize arrest of failure-to-report escapees, *plus* the prior criminal history and supposed special aversion to prison of such offenders. As the government would have it, the failure-to-report escapee should be treated as if he had committed the different crime of resisting arrest. Only by fundamentally changing the offense can the government transform the inaction essential to

commit failure-to-report escape into violent and aggressive conduct. U.S. Br. 36; *see also id.* at 13-20.

This Court should reject the government's approach for numerous reasons. The government asks this Court to abandon the categorical rule, established by this Court's precedent, which evaluates an unenumerated offense based solely on the conduct encompassed by its elements. The government's approach also conflicts with *Begay*, would impose great burdens on courts applying the residual subclause in future cases by inviting the courts to draw doubtful inferences from haphazardly compiled data (as the government has done here), and would raise serious constitutional concerns.

In addition, the government misses the mark when criticizing petitioner's approach on the ground that the enumerated offenses will often produce injuries after the offense is complete. U.S. Br. 30-33. Petitioner's approach is indifferent to when an injury occurs. Following this Court's decisions, petitioner focuses on whether *dangerous circumstances* are created by the conduct encompassed by the elements of the offense, and that conduct alone. It simply cannot be said that the conduct encompassed by the elements of failure-to-report escape by itself creates dangerous circumstances similar to those created by the enumerated offenses.

Finally, even if this Court were to conclude that failure-to-report escape involves purposeful, violent and aggressive conduct, it still would have to determine whether the residual subclause extends to crimes beyond those targeting property. The government does not deny that failure-to-report escape does not target property. Instead, it argues that the residual subclause should not be so limited. But the government has offered no legitimate basis to

adopt a broad interpretation of the residual subclause that would swallow clause (i) of the definition of "violent felony," and that would ignore the substantial evidence, both structural and in the Act's drafting history, supporting a property crime limitation.

I. FAILURE-TO-REPORT ESCAPE DOES NOT INVOLVE VIOLENT AND AGGRESSIVE CONDUCT.

The failure-to-report escapee merely knowingly fails to report to prison when he is under a legal obligation to do so. He does nothing violent. He does nothing aggressive. He does nothing at all.

The judgment of the court of appeals, therefore, must be reversed because, as petitioner has argued, Pet. Br. 20, the ACCA's definition of "violent felony" is limited to crimes whose elements encompass violent and aggressive conduct. Petitioner's view follows from the statutory text and the categorical rule consistently applied by this Court to the ACCA. The government's various reasons for rejecting petitioner's view cannot withstand scrutiny.

A. An Unenumerated Offense Involves Violent And Aggressive Conduct If The Conduct Encompassed By Its Elements, And That Conduct Alone, Creates Dangerous Circumstances Similar To Those Created By The Conduct Encompassed By The Elements Of The Enumerated Offenses.

In *Begay*, this Court held that the residual subclause is limited to crimes that are "roughly similar, in kind as well as degree of risk posed," to the enumerated offenses. 128 S. Ct. at 1585. This Court further explained that an unenumerated

offense is similar "in kind" if it, like the enumerated offenses, "typically involve[s] purposeful, 'violent,' and 'aggressive' conduct." *Id.* at 1585, 1586.

Critically, the purposeful, violent, and aggressive conduct standard emerged from this Court's examination of the conduct encompassed by the elements of the enumerated offenses. This Court relied on the analysis in *Taylor* of the generic elements of burglary, and it referenced only the generic elements of the various other offenses. *Id.* at 1586.

Given this Court's exclusive focus on the conduct encompassed by the elements of the enumerated offenses, there is no basis in the language or rationale of *Begay*, or any other decision of this Court, for looking beyond the conduct encompassed by the elements of an *un*enumerated offense to determine whether that offense involves violent and aggressive conduct. Indeed, considering only the conduct encompassed by the elements of the offense follows from this Court's consistent practice of viewing predicate offenses on a categorical basis.

When this Court first confronted the ACCA, it noted that "Congress intended that the enhancement provision be triggered by crimes having certain specified elements." *Taylor* v. *United States*, 495 U.S. 575, 589 (1990). This "categorical approach" "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense" in determining whether a prior conviction is a violent felony. *Id.* at 602. In *Shepard* v. *United States*, this Court explained that *Taylor*'s "categorical approach" "refers to predicate offenses in terms ... of ... the 'element[s]' of crimes." 544 U.S. 13, 19 (2005) (alteration in original). That focus was repeated in *James* v. *United States*, which directed

lower courts to consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." 127 S. Ct. 1586, 1597 (2007); *see id.* at 1594 (courts should consider "whether the elements of the [predicate] offense are of the type that would justify its inclusion within the residual provision") (emphasis omitted). And most recently, in *Begay*, this Court not only began its discussion by acknowledging that it was guided by the categorical rule, 128 S. Ct. at 1584 ("we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense"), but also exclusively focused on "the conduct for which the drunk driver is convicted," and rejected other considerations advanced by the government, in determining whether felony DUI was similar in kind to the enumerated offenses. *Id.* at 1587.

A focus on the conduct encompassed by the elements of the predicate offense also stems from the ACCA's text and the long recognized fact that the ACCA targets "'inherently dangerous'" crimes. *Taylor*, 495 U.S. at 585 (quoting *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 14 (1986)). The residual subclause directs a focus on the "conduct" "involve[d]" in committing the offense, 18 U.S.C. § 924(e)(1)(B)(ii), which is to say the conduct encompassed by the elements of offense. Likewise, the elements of the offense make up the conduct that categorically *inheres* in a prior conviction. *Shepard*, 544 U.S. at 24 (Souter, J.) (stating that "any sentence under the ACCA [must] rest on a showing that a prior conviction 'necessarily' involved" certain facts). As discussed in petitioner's brief, the conduct

encompassed by the elements of each of the enumerated offenses *alone* inherently creates dangerous circumstances. Pet. Br. 16-19. The conduct encompassed by the elements of burglary and extortion create a substantial risk of a violent confrontation. *Taylor*, 495 U.S. at 588 (discussing the "inherent potential for harm to persons" from generic burglary); *James*, 127 S. Ct. at 1607 (Scalia, J., dissenting) (extortion's potential for violent confrontation is even greater than that from burglary because extortionist necessarily threatens another). And, as even the government acknowledges, the conduct encompassed by the elements of arson and crimes involving the use of explosives is inherently dangerous because of the risk to others from the potential release of a harmful force. U.S. Br. 26-27.

The fact that the conduct encompassed by the elements of each enumerated offense, by itself, creates dangerous circumstances is the foundation for the inference that an offender with three prior "violent felonies" is someone who, if later possessing a gun, is more likely to "use [it] deliberately to harm a victim." *Begay*, 128 S. Ct. at 1586. The Court in *Begay* drew the inference of future dangerousness from the fact that Congress had enumerated "[c]rimes *committed* in ... a purposeful, violent and aggressive *manner*." *Id.* (emphases added). "That conduct" alone—namely, the conduct encompassed by the elements of the offense—supports Congress's decision to punish such a felon more harshly than others. *Id.* Likewise, only those unenumerated crimes the elements of which include violent and aggressive conduct can support an ACCA sentencing enhancement.

The government responds to petitioner's argument by distorting it. The government says petitioner has

argued that an offense is violent and aggressive only when "any potential violence or injury" to another occurs during the commission of the offense. U.S. Br. 29-30. It then explains that such a standard must be wrong because injuries to others often occur after the enumerated offenses are complete, and that such a standard would exclude what it considers obviously violent crimes—"like placing a biological toxin in a mass transportation vehicle"—from the scope of the Act. *Id.* at 30-32. The government has contructed, and ably burned, a straw man.

As petitioner explained, Pet. Br. 15-21, and repeats here, this Court's decisions dictate that an offense involves violent and aggressive conduct if the conduct encompassed by its elements, and that conduct alone, creates dangerous circumstances similar to those created by the conduct encompassed by the elements of the enumerated offenses. This does not mean that any actual injury to another need occur during the commission of the offense. But it does mean that the *dangerous circumstances* must be created merely by engaging in the conduct encompassed by the elements of the offense. Someone who places a biological toxin in a mass transportation vehicle has created dangerous circumstances very much like crimes involving the use of explosives or arson simply by engaging in the conduct encompassed by the elements of the offense. *See* 18 U.S.C. § 1992(a)(2). That injuries to others may occur *after* that conduct is complete does not matter under petitioner's interpretation of the statute.

B. The Conduct Encompassed By The Elements Of Failure-To-Report Escape Is Not Violent And Aggressive.

The government only barely discusses the conduct encompassed by the elements of failure-to-report

escape. But it does suggest that the "conscious decision" not to report can be deemed violent and aggressive conduct.[1] U.S. Br. 28. That is wrong.

A "conscious decision" is not conduct. The government tacitly concedes as much when acknowledging that the "means" used by the failure-to-report escapee to achieve the consciously sought-after result are indeterminate. U.S. Br. 28. The government asks this Court to treat as "irrelevant" the fact that elements of the offense permit the crime to be committed by doing nothing. *Id.* But not only does *Begay* refuse to treat the manner in which the crime is committed as irrelevant, it also makes the manner in which the crime is committed the central object of the inquiry. 128 S. Ct. at 1586 (explaining that the object of the ACCA is "[c]rimes committted in ... a purposeful, violent and aggressive *manner*") (emphasis added).

This Court's decision in *James*, too, makes clear that the "conduct" that must be violent and aggressive, and create dangerous circumstances, is separate from any "conscious decision" that the elements of the offense might also require. *James* held that attempted burglary is a "violent felony" under the residual subclause only when the elements of the offense require "an overt act directed toward the entry of a structure." 127 S. Ct. at 1596. It expressly refused to hold that attempted burglary is a "violent felony" under the ACCA in states where attempted burglary is defined to include mere "preparatory conduct"—conduct like making a duplicate key or casing a building. *Id.* at 1596 & n.4.

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[1] Contrary to the government's suggestion, U.S. Br. 23, 25, Petitioner does not deny that failure-to-report escape is "purposeful" within the meaning of *Begay*.

The "conscious decision" of the attempted burglar in preparatory-conduct states is the same as that in other states: the offender has decided to try to unlawfully enter a structure with the intent to commit a felony. *See, e.g.*, *United States* v. *Strahl*, 958 F.2d 980, 986 (10th Cir. 1992) (noting that while "an attempted burglary conviction [under Utah law] may be based upon [preparatory] conduct" "the state must establish ... that the defendant took these steps 'with the kind of culpability otherwise required' for the commission of a burglary"). Yet this Court made clear that it would leave for another day—or lower court resolution—"whether the more attenuated *conduct* encompassed by" preparatory-conduct laws justified including convictions under those statutes as violent felonies. *James*, 127 S. Ct. at 1596 (emphasis added); *see United States* v. *Fell*, 511 F.3d 1035, 1044 (10th Cir. 2007) (post-*James* decision concluding that conspiracy to commit burglary under Colorado law is not a "violent felony" because "overt act" requirement can be satisfied by "attenuated conduct" that "create[s] no risk of a violent confrontation").

In any event, even if a "conscious decision" could be deemed conduct, it surely is not violent and aggressive. The government never advances the absurd suggestion that *deciding*—a purely mental process—is violent and aggressive. It is not. *United States* v. *Templeton*, __ F.3d __, 2008 WL 4140616, at *5 (7th Cir. Sept. 9, 2008) (a prisoner who "fails to return from ... furlough ... is guilty of escape without so much as moving a muscle").[2] Instead, the

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[2] The government mischaracterizes petitioner's point that the offense can be committed while sleeping. Petitioner never said anything about accidentally oversleeping. *Compare* U.S. Br. 26, *with* Pet. Br. 14. The point, the same one Chief Judge

government argues that sometimes deciding not to do what the law requires can produce harm and can be a crime. U.S. Br. 28-29 (discussing potential for homicide or arson from failure to act when the law imposes a duty to do so). But this is a distraction, not an explanation for the counterintuitive notion that deciding is violent and aggressive.

That a failure to act can produce harm does not transform the failure to act into violent and aggressive conduct. A parent who refuses to provide medical care to his child knowing that the child is seriously injured bears responsibility for the harm suffered and has committed a crime, but not in a violent and aggressive manner. *See Woods* v. *State*, 724 So.2d 40, 48 (Ala. Crim. App. 1997). And if the government means to suggest that the rule proposed by petitioner would preclude treating arson, burglary, and homicide as violent felonies in the unusual case involving a failure to act, then the government does not understand the categorical rule. Arson, burglary, and homicide are categorically violent felonies under the ACCA, regardless of the "unusual cases" the government hypothesizes. *James*, 127 S. Ct. at 1597; *Begay*, 128 S. Ct. at 1584 ("we consider the offense generically ... not in terms of how an individual offender might have committed it on a particular occasion").

Likewise, that a failure to act is not violent and aggressive conduct means that a "continuing" failure to act is not violent and aggressive either. The government's argument that failure-to-report escape is a continuing offense in numerous jurisdictions is thus irrelevant. U.S. Br. 33-35. The conduct

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Easterbrook makes in *Templeton*, is that the offense requires no physical act at all.

encompassed by the elements of the offense is not violent and aggressive from the start, and the conduct encompassed by "continuing" to fail to report—which is the very same conduct—is also not violent and aggressive.

C. The Risk Of Confrontation During Recapture Does Not Mean Failure-To-Report Escape Involves Violent And Aggressive Conduct.

The government argues that failure-to-report escape involves violent and aggressive conduct because the crime "creates a clear risk of a confrontation during recapture efforts in which law enforcement officers or bystanders may be injured." U.S. Br. 27. Accepting this argument requires abandoning the categorical approach this Court has consistently applied, creates enormous practical difficulties in applying the statute to other unenumerated crimes, would destroy the distinction this Court drew in *Begay* between the risk of harm and the manner in which the crime is committed, and would raise grave constitutional concerns. There is no support for the government's position.

The government asks this Court to reason as follows. Failure-to-report escape is violent and aggressive if the commission of failure-to-report escape creates a serious potential risk of violent confrontation between law enforcement and failure-to-report escapees. U.S. Br. 12-13, 35-36.[3] The

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[3] Though the statute says that the offense must involve conduct that presents a "serious potential risk of *physical injury* to another," 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added), the government denies that it must demonstrate a serious potential risk of *actual injury* to another. U.S. Br. 21. There is no indication that the government even attempted to gather

government reports that law enforcement officials prioritize capture of failure-to-report escapees and that such escapees are captured at a high rate. *Id.* at 14-15, 36. From this premise, the government asks this Court to *infer* that there is a serious potential risk of confrontation between law enforcement and the failure-to-report escapee. *Id.* at 36.

But a risk of confrontation is insufficient; the confrontation, even in the government's view, must have the serious potential to be violent. To establish that potential, the government contacted various state correctional officials and asked them to compile data on the criminal histories of non-custodial escapees.[4] The government compiled its made-for-this-proceeding data into the tables attached to its brief.[5] The government's attorneys made no effort to confirm the data reported to them. Reply App. 3a. From this data, the government reported that anywhere from 40% to 77% of non-custodial escapees in the respective states have a history of violent criminal conduct. U.S. Br. 16-17 & n.5. The higher figures depend on defining drug possession and distribution crimes as "violent," which the government included based on the association of the drug

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information from any source on the existence (much less rate) of actual injuries to law enforcement or bystanders in connection with failure-to-report escape.

[4] The government filed with this Court the letter and information it provided to petitioner's counsel on October 15, 2008. For ease of reference, petitioner has reproduced that letter and the information on Florida and Massachusetts, referred to later in this brief, in the appendix to this brief.

[5] Petitioner is unaware of which states were contacted. But the government has indicated that several of those states did not provide any data, or any data distinguishing custodial escapes from non-custodial escapes. Reply App. 2a-3a.

trade in general with violence. *Id.* at 17 n.5.[6] The government also speculates that failure-to-report escapees are particularly averse to prison based on the fact that they failed to report. *Id.* at 18, 36. Based on its calculations and speculation, the government asks this Court to *infer* that the failure-to-report escapee is likely to respond violently when the *inferred* confrontation between the escapee and law enforcement takes place. *Id.* at 18-19, 36.

This elaborately constructed pseudo-statistical presention, laying inference upon inference, ultimately amounts to this: failure-to-report escape can be expected to lead to resisting arrest, and therefore this Court ought to treat failure-to-report escapees as if they have engaged in conduct that amounts to resisting arrest. This Court need not today determine whether resisting arrest is a violent felony under the residual subclause.[7] But it should, for a variety of reasons, make clear that the residual

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[6] The government appears to have erred in calculating the percentage of escapees in Florida with violent criminal histories. Considering the crimes the government has deemed violent, *see* U.S. Br. 17 n.5, including drug offenses, 68% (396 out of 585), Reply App. 9a, were serving time for "violent crimes," not 76% as the government reported, *see* U.S. Br. 16. The fall-off from subtracting drug cimes is substantial, reducing the portion to 37% (214 out of 585), which is lower than what the government had reported as the lowest percentage among the states it considered, *see id.* 17 n.5.

[7] In Illinois, felony resisting arrest is accomplished by "knowingly resist[ing] or obstruct[ing] the performance by one known ... to be a peace officer ... of any authorized act within his official capacity," that results in an injury to the officer. 720 Ill. Comp. Stat. Rev. 5/31-1(a), (a-7). Federal law defines "forcibly" resisting arrest alongside assaulting an officer, *see* 18 U.S.C. § 111(a)(1), but only considers it a felony when there is physical contact, *see id.* § 111(a).

subclause of the ACCA cannot be interpreted to allow a court to treat a conviction for one predicate offense as if it were a conviction for a different, more violent, predicate offense.

1. The government is proposing a substantial intrusion on the categorical approach. Law enforcement priorities are not part of the offense conduct. Whether a failure-to-report escapee has a violent criminal history is not part of the offense conduct. By even introducing the question of what might happen when law enforcement officials attempt to capture a failure-to-report escapee, the government is asking this Court to consider cirumstances created by some conduct *other* than the conduct encompassed by the elements of the offense.

Indeed, the government admits as much when it argues that a potential capture is "closely related" to the "offense conduct that constitutes escape." U.S. Br. 35.[8] In other words, it is not part of the "offense conduct" itself. The government offers no reason, other than its desire to sweep failure-to-report escape within the residual subclause, for compromising this Court's uniform adherence to the categorical approach. *See Shepard*, 544 U.S. at 23 (discussing

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[8] The government argues that capture is "closely related" to failure-to-report escape in a way that is different from other crimes because "the conduct involved in an ordinary crime does not include the avoidance of custody." U.S. Br. 35. But all crimes typically involve the avoidance of custody. *See id.* at 14 ("A burglar generally goes out of his way to ensure that his offense goes undetected ...."); *United States* v. *Gourde*, 440 F.3d 1065, 1078 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting) ("common sense suggests that [the defendant child pornographer] liked to stay out of jail"). This supposed distinction between failure-to-report offenders and other offenders is no distinction at all.

how "time has enhanced even the usual precedential force" of the categorical rule because Congress has not modified the statute since that approach was adopted in *Taylor*). This Court has in the past rejected the government's "call to ease away from" the categorical approach. *Id.* It should do so again here.

2. As the government's own last-minute effort to create a record in this case reveals, the government's approach would impose insuperable burdens on courts administering this statute. One of the virtues of the categorical approach, and reasons for its adoption, is its relative ease of administration. *Taylor*, 495 U.S. at 600-02; *Shepard*, 544 U.S. at 20. Under the categorical approach, courts consider only readily available and verifiable information about the offender's prior conduct.

Under the government's approach, anything is fair game. The government here relies on anecdotal examples of violent confrontations, along with unverified data compiled on a haphazard basis, as the government was at the mercy of the ability and inclination of state officials to respond. Far from promoting consistency in the application of a statute that has been before this Court in each of the past three terms, the government's approach promises only greater variation in outcomes, as different courts receive different information and evaluate its quality based on different standards.

The uncertainty in the application of the government's approach is underscored by the substantial reason to doubt, as a matter of fact, the validity of the inferences the government asks this Court to draw from the data it compiled. The government asks the Court to *infer* from the data it created that there exists a substantial risk of violent

confrontations associated with failure-to-report escape. But the government did not report in its brief that it *directly asked* state officials to report such incidences. Reply App. 2a. The government received such data from two states: Massachusetts and Florida. Between them, those states reported 620 non-custodial escapes. *Id.* at 9a, 12a-14a. And between them, those states reported just 3 incidences of violence associated with efforts to capture the non-custodial escapees. *Id.*

In short, the government's own data contradict the very inferences it is asking this Court to draw. The data actually suggest law enforcement officials are able to reincarcerate non-custodial escapees at a high rate without much risk of violent confrontations. As a result, failure-to-report escape can be excluded from the residual subclause because it is not "roughly similar ... in degree of risk posed" to the enumerated offenses. *Begay*, 128 S. Ct. at 1585. The low rate of violent confrontations associated with non-custodial escape—from the government's data, less than 0.5%—underscores the complete absence in the government's brief of even a single reported incident of actual injury to law enforcement officials or an innocent bystander in connection with a non-custodial escape.

Nothing in the policies of the ACCA or basic principles of sound judicial administration recommend the government's approach. For this additional reason, this Court should adhere to the categorical approach and consider only the conduct encompassed by the elements of failure-to-report escape.

3. The government's approach also would require this Court to undo *Begay* before the ink has dried on the opinion. The government argues that failure-to-report escape is violent and aggressive because the

risk of a violent confrontation during capture efforts is greater for failure-to-report escape than other crimes. U.S. Br. 35-36. But *Begay* separated the question of the degree of risk of injury from the manner of commission of a predicate offense; it requires that an unenumerated offense be similar to the enumerated offenses in *both* respects. 128 S. Ct. at 1284-85; *Templeton*, 2008 WL 4140616, at *5 ("*Begay* requires similarities *other* than risk of injury."). By asking the Court to define the manner of commission of a crime as violent and aggressive *because* it (supposedly) carries the requisite degree of risk, the government is merely pretending to apply the violent and aggressive conduct standard. In fact, it is asking this Court to eliminate it. Fidelity to precedent, especially on a matter of statutory interpretation, demands more. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1074, *as recognized in Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994).

4. Finally, the government's approach also raises grave constitutional concerns.

To begin, the separation of powers concerns discussed in petitioner's brief, Br. 40-41, would be heightened if this Court were to adopt the government's approach. As the government would have it, the executive branch would have a substantial role in determining what crimes are included within the residual subclause. The government believes that courts should consider the degree to which law enforcement officials, including the U.S. Marshals Service, devote resources to apprehending those who commit an unenumerated offense. U.S. Br. 14-15, 35-36. Of course, the

executive branch has essentially unreviewable discretion over how to allocate its investigatory resources. *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). By the government's logic, a decision by the Justice Department to prioritize purely financial crimes would increase the risk of violent confrontation upon apprehension, perhaps to the point courts would have to deem them violent felonies under the ACCA. The content of a federal criminal statute should not be subject to variation based on unilateral executive branch judgments. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("The Executive, except for recommen-dation and veto, has no legislative power.").

The vagueness concerns raised by petitioner, Pet. Br. 39-40, would also be heightened if the government's approach were adopted. It is difficult to imagine how "ordinary people," *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), are supposed to understand what prior offenses are included within the residual subclause if, to figure that out, they must contact various state officials, gather and interpret the data provided, and contact law enforcement officials to determine where their priorities lie. If the residual subclause were interpreted in a way that required this process to be repeated for future unenumerated offenses, the constitutional vagueness concerns would be substantial.[9]

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[9] Likewise, the rule of lenity also should apply here if the government's approach is to be adopted. The government argues against application of the rule of lenity because it asserts that

Indeed, the government's approach is so radical that it would reignite the constitutional concern that the ACCA violates *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *See James*, 127 S. Ct. at 1600 (explaining that "by applying *Taylor*'s categorical approach, we have avoided" the Sixth Amendment issue); *Shepard*, 544 U.S. at 24-26 (Souter, J.) (discussing how the categorical approach avoids the "serious risk of unconstitutionality" under *Apprendi*); *see also id.* at 27-28 (Thomas, J., concurring) (stating that even the categorical rule of "*Taylor*[ ] has been eroded by this Court's subsequent Sixth Amendment jurisprudence"). The government is asking this Court to increase the maximum punishment to which petitioner is subject on the basis of certain factual findings. That raises substantial concerns under *Apprendi*.

For example, the prospect of a confrontation between failure-to-report escapees and law enforcement is a factual question. The government asks this Court to infer that the prospect of confrontation is high because law enforcement officials are dispatched to capture failure-to-report escapees. U.S. Br. 14 ("The United States Marshals Service informs us that it assigns a law enforcement officer to seek to capture all criminals who fail to report to prison."). But at least one published report calls the inference into doubt. Sarah Lindenfeld, *Prisoner Hops Off the Bus*, Raleigh News & Observer, Feb. 22, 1999, at A1 (prisoner riding from one facility to another on a

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there is no ambiguity in the statute. U.S. Br. 48. But members of this Court have disagreed. *Begay*, 128 S. Ct. at 1592 (Alito, J., dissenting) (stating that "the so-called 'residual clause' of [the ACCA] calls out for legislative clarification"); *James*, 127 S. Ct. at 1602 (Scalia, J., dissenting) (stating that the boundaries of the ACCA's "residual provision" were "ill defined").

Greyhound bus did not disembark as expected; U.S. Marshals would not pursue until given a court order, stating "[t]he inmates we transfer this way don't pose any danger"). If an offender's punishment is to be increased on the basis of a finding that the government sufficiently prioritizes capture of those who have committed the offense at issue, such that a confrontation is in fact sufficiently likely to occur between the offender and law enforcement, the question must be presented to a jury.

Similarly, the prospect that any such confrontation would prove violent also presents a factual question. The government claims it would because failure-to-report escapees commonly have prior violent criminal histories. As discussed above, however, the government's own evidence suggests that the prospect of violent confrontation is low. *Supra* at 15-16.[10] Under the Sixth Amendment, petitioner's sentence cannot be increased based on a court's weighing of the evidence and inferential reasoning.

These serious constitutional concerns provide an additional reason not to stray from the categorical approach. The government's efforts to complicate application of this statute and broaden its scope beyond any definable limits should be rejected.

II. THE RESIDUAL SUBCLAUSE IS LIMITED TO PROPERTY CRIMES.

Even if this Court were to abandon the categorical approach and *Begay*, adopt the government's

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[10] Further, the inference the government is asking this Court to draw amounts either to double-counting (for those failure-to-report escapees with a violent criminal history, the prior violent felony would already count against them) or the false attribution of prior violent conduct (for those who, in fact, have no prior violent crimes in their past). Neither is permissible.

approach to interpreting the statute, and conclude as a matter of fact that the risk of injury associated with failure-to-report escape is similar to that of the enumerated offenses, this Court still would have to conclude that the residual subclause is not limited to property crimes before it could affirm the court of appeals' decision. The government does not and cannot argue that failure-to-report escape is a property crime. Instead, the government argues that the residual subclause is not limited to property crimes. The government is wrong.

The government asserts that the property crime limitation finds no support in the text of the ACCA. U.S. Br. 37. But even the government does not deny that its interpretation of the residual subclause causes clause (ii) of the definition of "violent felony" to swallow clause (i) entirely. *Id.* at 43. The need to avoid rendering clause (i) superfluous provides a textual basis for narrowing the residual subclause in a way that preserves the efficacy of clause (i). *Knight* v. *Commissioner*, 128 S. Ct. 782, 788-89 (2008); *see also Jones* v. *United States*, 529 U.S. 848, 857 (2000) ("'Judges should hesitate ... to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense.'") (omission and alteration in original).[11] When, as here, it is clear that two closely related provisions of a statute should be interpreted "in tandem," consulting legislative history makes

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[11] The government argues that its interpretation of clause (ii) does not render clause (i) superfluous because clause (i) provides a simpler way to determine that some crimes are violent felonies than the complicated method they propose should be used under clause (ii). U.S. Br. 43-44. The government offers no authority for this novel proposition.

sense. *Safeco Ins. Co. of Am.* v. *Burr*, 127 S. Ct. 2201, 2213 n.15 (2007).

This need to narrow the scope of the residual subclause warrants consulting the Act's drafting history to identify the best narrowing principle.[12] The government tries to downplay the fact that the language that ultimately became the residual subclause was the product of a legislative inquiry into whether and how to incorporate crimes against property into the ACCA. *See* H.R. Rep. No. 99-849, at 3, 5 (1986). The government argues that the residual subclause was intended to treat property crimes "as a subset of a broad category." U.S. Br. 43. But nothing in the House Report discussing the language that became the residual subclause suggests that Congress was thinking beyond property crimes. The government is seizing on the residual subclause's potentially expansive language to stretch the statute beyond what Congress intended.

The government also argues that the enumerated offenses are not property crimes, and hence it makes no sense to limit the residual subclause to property crimes. U.S. Br. 37-40. But the fact that crimes involving the use of explosives and extortion *can* be committed without harming or seeking to take property does not change the fact that in the

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[12] The government argues that the statute is not ambiguous, and therefore this Court should not consult the legislative history at all. U.S. Br. 42. Yet this is the third consecutive term that this Court has had to construe the residual subclause, which amply supports the view expressed by members of this Court that the clause is in need of "clarification," *Begay*, 128 S. Ct. at 1592 (Alito, J., dissenting), and is "ill-defined," *James*, 127 S. Ct. at 1602 (Scalia, J., dissenting). Perhaps that is why this Court is no stranger to the ACCA's legislative history. *Begay*, 128 S. Ct. at 1585-86; *Taylor*, 495 U.S. at 581-89.

"ordinary case," *James*, 127 S. Ct. at 1597, those crimes involve harm to property and the unlawful acquisition of property.[13] And the fact that the enumerated offenses were added at the last minute before passage of the ACCA, and attached to what became the residual subclause, suggests that Congress understood them as exemplars of the kinds of property crimes it intended to target. *See* Pet. Br. 33.

The enumerated offenses, in their ordinary incarnations, all pose threats to property. Congress crafted the language that became the residual subclause to capture such property crimes. And limiting the clause to such crimes preserves the significance of clause (i) of the definition of violent felony.

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[13] The government argues that extortion is generally considered a crime against the government, not property. U.S. Br. 38-39 (citing 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.4, at 197-98 (2d ed. 2003)). But the cited passage discusses extortion's *origins* as a crime solely against the government. When discussing current law and extortion more generally, LaFave stresses that it is a property crime that should be grouped with other property crimes under theft. 3 LaFave, *supra* § 20.4(b), at 204; *see also id.* § 19.8(d), at 145-48 ("Extortion (blackmail) may be thought of as simply another way—in addition to the ways encompassed by the three crimes of larceny, embezzlement, and false pretenses—in which one person can misappropriate another's property.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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October 24, 2008

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APPENDIX

APPENDIX

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530
October 15, 2008

Robert N. Hochman, Esq.
Sidley Austin LLP
One South Dearborn Street
Chicago, Illinois 60603

Dear Mr. Hochman:

This letter responds to your request of October 7, 2008, for additional information about the statistics cited on pages 16-17 and in Appendix B of the Brief for the United States in *Chambers v. United States*, S. Ct. No. 06-11206. Your letter asks how we obtained those statistics and whether attorneys for the United States made any effort to verify them.

The federal statistics cited on page 16 and 4a of the government's brief represent a summary of data that our office obtained from the Office of Policy and Legislation (OPL) of the Criminal Division of the United States Department of Justice. OPL used data provided by the United States Sentencing Commission to prepare the information that it provided to us. Justice Department attorneys prepared the summary on page 4a of the government's brief and verified that the summary accurately reflects the data provided by OPL. Those attorneys did not, however, attempt to verify the underlying data.

We also received from OPL other data, which OPL had prepared from data provided by the Sentencing Commission, about defendants convicted of escape under 18 U.S.C. 751 or 4082. We have attached to this letter the 16-page report that OPL provided to us. See Attachment A. The data on pages 16 and 4a of the government's brief comes from the third chart on page 12 of the OPL report. The other charts in the OPL report contain information on the primary offense of conviction, the district of conviction, the race or ethnicity of the offender, the type of sentence imposed, the length of the term of imprisonment, the presence of a weapon, and the application of various Guidelines adjustments (including adjustments for aggravating or mitigating role in the offense, obstruction of justice, reckless endangerment during flight, armed career criminal status, career offender status, commission of the offense less than two years after a prior offense, and the addition of criminal history points for prior violent convictions).

The state statistics cited on pages 16-17 and 5a-11a of the government's brief represent a summary of data that our office obtained by requesting information from the departments of corrections of several of the larger States. We asked those States for available data describing the number of non-custodial escapes during the past five years, the crimes for a which the escapees were sentenced at the time of their escapes, whether the escapees committed other crimes while absent from custody, and whether there was violence associated with recapture.

Several States did not provide us with any data or did not provide data capable of statistical analysis. Several other States provided data that either did not include failure-to-report and failure-to-return escapes

or did not isolate those types of escape from other types of escape. The government did not use that data in its brief. Accordingly, we will not discuss that data further.

Five States provided us with data that isolated failure-to-report and failure-to-return escapes from other types of escape and reported the crimes for which the escapees were sentenced at the time of their escapes. Justice Department attorneys prepared the summary tables on pages 5a-11a of the government's brief using that data. Those attorneys did not however, seek to verify the underlying data. We have attached to this letter the reports sent to us by each of the five States. See Attachments B-F.

In response to your letter, we reviewed the summary tables prepared by our attorneys and discovered two mistakes. One of the two mistakes was a printing error that did not affect the statistics cited in the body of our brief. The other mistake, however, requires corrections to the statistics for Massachusetts on pages 16-17 of the brief. After consultation with the Clerk's office, we are filing a corrected Brief for the United States, along with a letter to the Court, on which you are copied, informing the Court of the corrections. We are serving you under separate cover with copies of the corrected brief.

A few of the States sent us additional data on crimes committed by escapees before recapture and on violence during recapture. We did not use that information in preparing our brief. That information is, however, included in the reports attached to this letter.

In order to assist your review of the attachments, we have described below the data provided by each of

the five States that isolated failure-to-report and failure-to-return escapes. In the course of that description, we have also explained more fully the corrections that we made to our brief to ensure that we accurately described the data:

- *Florida:* An official with the Florida Department of Corrections provided us with two spreadsheets of escapee data. Those spreadsheets are included in Attachment B to this letter. The first spreadsheet contains a table listing, by primary offense, the number of escapes from work release from July 1, 2003, through June 25, 2008. The second spreadsheet contains more detailed offense information for the escapees from the first table who were in the primary offense groups of "burglary," "property theft/fraud/damage," and "drugs." The first spreadsheet also contains an additional table describing violent escape conditions for certain escapees.

  Justice Department attorneys combined the data from the two tables listing the primary offense for the escapees to produce a master table from which they calculated the percentage cited on page 16 of the government's brief. In reviewing the Florida summary table on page 5a of the government's brief, we discovered that the table omits the final three lines of our Master table of Florida data. Our corrected brief includes the full summary table.

- *Massachusetts:* An official with the Massachusetts Department of Correction provided us via e-mail with information about escapes between January 1, 2003, and June 30, 2008. That information includes the offenses for which the escapees were sentenced at the time of

their escapes, the nature of the escapes (custodial, walk-away, or failure to return from release into the community), whether charges were filed against the escapees for crimes committed during the escape, and whether records indicate that the escapes involved violence.

Justice Department attorneys entered the information about the offenses for which the escapees were sentenced at the time of their escapes into a summary table, which we used to create the chart on page 6a of the government's brief and to calculate the statistics cited on pages 16-17 of the brief. In reviewing our summary table, we discovered that it mistakenly classified the four walkaway escapees in 2008 as failure-to-return escapees. That error was also reflected in the chart in our brief. We have corrected that mistake in the chart in our corrected brief. Based on the corrected figures, the corrected brief also revises the Massachusetts statistics on pages 16-17 as follows: "77%" in the parenthetical on page 16 now reads "72%" and "64%" in footnote five on page 17 now reads "56%."

We have included the substance of the e-mail from the Massachusetts Department of Correction, as well as a copy of the (corrected) summary table prepared by Justice Department attorneys, in Attachment C to this letter.

- *North Carolina:* An official with the North Carolina Department of Correction provided us with two spreadsheets of data about failure-to-return escapes from July 1, 2003, to June 30, 2008. Those two spreadsheets are included in Attachment D to this letter. The first

spreadsheet lists, for each escapee, the date of escape, the crime of incarceration, the type of authorized release from which the escapee failed to return, and whether the escapee was found to have committed additional crimes before recapture. The second spreadsheet reports on the escapees' most serious offense prior to escape. Justice Department attorneys used the data from the first spreadsheet to calculate the summary table on pages 7a-8a of the government's brief.

- *Pennsylvania:* An official with the Pennsylvania Department of Corrections provided us with a spreadsheet that lists the offenses of incarceration for walkaway escapes and failure-to-return escapes between January 1, 2003, and June 24, 2008. The table further breaks down how many of those escapees were captured and how many were still at large. Justice Department attorneys used the failure-to-report data from that spreadsheet to generate the summary table at pages 9a-10a of the government's brief. The spreadsheet provided by Pennsylvania is included in Attachment E to this letter.

- *Washington:* An official with the Washington Department of Corrections provided us with tables containing information on failure-to-return escapes from January 1, 2003, through July 23, 2008. The Washington official provided a table listing the offenses for which the escapees were incarcerated a second table providing a detailed breakdown for the offense category of "drugs," and a table listing new crimes committed by the escapees while on escape status. The tables provided by

Washington are included in Attachment F to this letter. Justice Department attorneys used the data on the offenses for which the escapees were incarcerated to prepare the summary table at page 11a of the government's brief.

We hope this information is of assistance, and we regret the inaccuracies in our initial brief.

Sincerely,

/s/ Gregory G. Garre
Gregory G. Garre
Solicitor General

ATTACHMENT B

FLORIDA DATA

Florida Department of Corrections
Bureau of Research and Data Analysis
Date of production: June 25, 2008

WRC Escapes since 7/1/2003 by Primary Offense Groups

PRIMARY OFFENSE GROUP COUNTS		
PRIMARY OFFENSE GROUP	Count	Cumulative Count
1 -MURDER/MANSLAUGHTER	9	9
3 -ROBBERY	38	47
4 -VIOLENT, OTHER	25	72
5 -BURGLARY	142	214
6 -PROPERTY THEFT/FRAUD/DAMAGE	128	342
7 -DRUGS	182	524
8 -WEAPONS	22	546
9 -OTHER	39	585

Level 3 Violent Escape Conditions for WRC Escapes Since 7/1/1995

Violence During Escape Periods	Count	Cumulative Count
1 - Violence while being arrested/returned	1	1
2 - Violence while attempting to escape	2	3
3 - Violence/crime after escape prior to arrest	7	10
4- Unknown or not specified	5	15

Additional Offense Breakdown for Burglary, Theft and Drugs

Primary Offense Group/Primary Offense Description	Primary Offense Group/Primary Offense Description by Felony Class					Total
	1ST DEGREE	[illegible]/LIFE	2ND DEGREE	3RD DEGREE	LIFE	
6-28-BURGLARY, STRUCTURE	0	0	3	35	0	38
6-29-BURGLARY, DWELLING	0	0	90	4	0	94
6-30-BURGLARY, ARMED	3	2	0	0	0	5
6-31-BURGLARY WITH ASSAULT	0	1	0	0	2	3
6-32-BURGLARY/TRESPASS, OTHER	1	0	0	1	0	2
6-33-GRAND THEFT, OTHER	0	0	2	25	0	27
6-34-GRAND THEFT, AUTOMOBILE	0	0	0	35	0	35
6-35-STOLEN PROPERTY	2	0	43	0	0	45
6-36-FORGERY/COUNTERFEITING	0	0	0	6	0	6
6-37-WORTHLESS CHECKS	0	0	0	2	0	2
6-39-FRAUDULENT PRACTICES	1	0	1	6	0	8
6-39-OTHER THEFT/PROPERTY DAMAGE	0	0	0	5	0	5
7-40-DRUGS, MANUFACTURE/SALE/PURCHASE	15	0	82	8	0	105
7-41-DRUGS, TRAFFICKING	25	0	1	0	0	26
7-42-DRUGS, POSSESSION/OTHER	0	0	0	51	0	51
Total	47	3	222	178	2	452

ATTACHMENT C

MASSACHUSETTS DATA

An official of the Massachusetts Department of Correction Fugitive Apprehension Unit, provided our Office via e-mail with the following information about Massachusetts escapes from January 1, 2003, through June 30, 2008. We have reproduced the substance of the e-mail, adding some underscoring and line breaks:

2008 escapes to date 4.
All were walkaways, none used violence to escape and none used violence when captured. Two were serving time for armed robbery and two were serving time for unarmed robbery. No new charges have been reported on any of the four.

2007 escapes we had 4.
All were work release, none used violence to escape and none used violence when captured. One was serving time for Distribution of Class B Cocaine, one for Larceny over $250 x 11, one for theft of a motor vehicle, one for weapons violations. No new charges have been reported on these four.

2006 escapes we had 9.
5 were walkaways, none used violence to escape or when they were captured. One serving time for armed robbery gun (no new charges when captured), one serving time for armed assault in a dwelling (new charges were B+E Night time and Larceny less than $250), one serving time for Mayhem (no new charges when captured), one for possession of class B Cocaine with intent to distribute (no new charges when captured) and one was serving time for poss[.] weapon, assault, and ABDW (new charges when captured were assault to commit a felony, assault and battery, and assault to rape).

Two of the escapes were from work release, neither used violence to escape nor when captured. One was serving time for ABDW firearm (no new charges when captured) and one serving time for ABDW, Larceny, and B+E (no new charges when captured).

Two of the escapes were from program related activities, neither used violence to escape nor when captured. One was serving time for Unarmed Burglary and the other for False Checks, Poss[.] of Class B, and sex for a fee. Neither had new charges when captured.

2005 escapes we had 10.

4 were walkaways, none used violence to escape nor when captured and none had new charges when captured. One was serving time for B+E Daytime with intent to commit a felony, one for receiving stolen goods, one for armed assault to rob or murder, and one for receiving a stolen motor vehicle.

5 escapes were from work release programs, none used violence to escape nor when captured and none had new charges. Three were serving time for Armed Robbery, one for ABDW - Gun, and one for Armed Assault/Armed Robbery[.]

The other escape was from a secure facility.

2004 escapes we had 4.

2 were walkaways, neither used violence to escape not when captured and neither had new charges when captured. One was serving time for ABDW x3 and MV Theft, and the other for ABDW.

Two were escapes from work release programs, neither used violence when escaping. One was serving time for B+E night time with intent to commit a felony, no new charges when captured. The other was serving time for ABDW and OUI, he resisted when captured and was charged with

resisting arrest and assault and battery on a police officer X 3.

2003 escapes we had 6.
2 were walkaways, one serving time for Distribution of Class B Cocaine (charged with failing to stop for a police officer when captured) and the other was serving time for B+E night time with intent to commit a felon[y] and receiving stolen goods (no new charges when captured).

Three of the escapes were from Work Release Programs, one was serving time for Poss[.] Class B Cocaine with intent to distribute (when captured charged with Conspiracy to violate drug laws, possession of Class D, Resisting arrest, interfering with police officer and A+B on a police officer), one was Serving time for Distribution of Class B Cocaine (no new charges when captured), and one was serving time for MV Theft (no new charges when captured).

The other escape was from a secure facility.

Justice Department attorneys placed the data onto tabular form, as follows:

Commitment Offense	2003 WA	2003 FTR	2004 WA	2004 FTR	2005 WA	2005 FTR	2006 WA	2006 FTR	2007 WA	2007 FTR	2008 WA	2008 FTR	TOTAL WA	TOTAL FTR
Armed robbery						3		1				2	2	3
Unarmed robbery												2	2	
Armed assault					1	1		1					2	1
Assault and battery w/ deadly weapon			2	1		1		1	2				3	4
Mayhem								1					1	
Distribution of class B cocaine	1	1								1			1	2
Possession of class B cocaine w/ intent to dist.		1						1					1	1
Possession of class B drug									1					1
Larceny over $250										1				1
Receiving stolen goods						1							1	
Breaking and entering w/ intent to commit felony	1			1		1							2	1
Unarmed burglary								1						1
Theft of a motor vehicle		1								1				2
Receiving stolen motor vehicle						1							1	
Weapons violation										1				1

WA=Walk-away escape
FTR=Failure to return from work release or program-related activities in the public sector

Supreme Court, U.S.
FILED
SEP 2 0 2007
OFFICE OF THE CLERK

No. 06-11206

In the Supreme Court of the United States

DEONDERY CHAMBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's conviction for escape, based on his knowing failure to report to a penal institution after his conviction for a felony, qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e), because it "involves conduct that presents a serious potential risk of physical injury to another."

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 90-95) is reported at 473 F.3d 724.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2007. A petition for rehearing was denied on February 16, 2007 (J.A. 96-97). The petition for a writ of certiorari was filed on May 8, 2007, and was granted on April 21, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Illinois to possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He had prior convictions for robbery and aggravated battery, distributing cocaine near public housing, and escape by knowingly failing to report to a penal institution after conviction for a felony. The district court determined that those prior convictions, including the conviction for failure-to-report escape, qualified as "violent felon[ies]" or "serious drug offense[s]" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), and thus required a mandatory minimum 15-year sentence. The court sentenced petitioner to 188 months of imprisonment. The court of appeals affirmed. J.A. 52, 84-85, 90-95, 110-115.

1. Section 922(g)(1) of Title 18, United States Code, makes it unlawful for a person who has been convicted of a felony to possess a firearm. Violation of that prohibition ordinarily carries a maximum term of imprisonment of ten years. 18 U.S.C. 924(a)(2). The ACCA, as amended in 1986, provides a 15-year mandatory minimum sentence for persons convicted of violating Section 922(g)(1) who have three prior convictions "for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B).

2. In May 2005, after petitioner and a neighborhood resident exchanged heated words, petitioner drove to his home, got a handgun, loaded it, and returned to the scene of the fight. When he met his adversary there, petitioner pulled out his gun and fired into the air. Petitioner then fled in a car driven by his girlfriend. Police officers tried to stop the fleeing car by positioning a squad car in its path, but petitioner instructed his girlfriend to swerve around the police car and to keep going. The pursuit continued at speeds of up to 80 miles per hour. In the course of the high-speed chase, petitioner threw his gun out of the car window onto the lawn of a residence. The gun was loaded with three rounds of live ammunition. Petitioner was later arrested and detained without bond. He pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). J.A. 3, 27-29, 30, 32, 35, 40-42, 100-103.

3. At sentencing, it was undisputed that petitioner had two prior convictions for a violent felony or serious drug offense: (1) a conviction for robbery and aggravated battery and (2) a conviction for distributing cocaine near public housing. It was also undisputed that petitioner had a prior felony conviction under the Illinois escape statute. Petitioner disputed, however, whether that conviction qualified as a "violent felony" under the ACCA. J.A. 110-115, 135-136.

The Illinois escape statute creates several offenses, which vary in severity depending on the nature of the violation and the underlying charges. The subsection of

the statute that is relevant here creates two offenses, escape from a penal institution or direct custody, which is a Class 2 felony, and escape involving the failure to report or return to penal institution, which is a Class 3 felony:

> A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement is guilty of a Class 3 felony.

720 Ill. Comp. Stat. 5/31-6(a). Petitioner had been convicted of the "class 3 felony" of "knowingly fail[ing] to report * * * to * * * a penal institution" following conviction of a felony. J.A. 67. That offense is punishable by up to five years of imprisonment. 730 Ill. Comp. Stat. 5/5-5-3(b), 5/5-8-1(a)(6).[1]

The district court determined that petitioner's failure-to-report escape qualified as a "violent felony" based on *United States* v. *Bryant*, 310 F.3d 550 (7th Cir. 2002). J.A. 52. *Bryant* held that the federal crime of escape, 18 U.S.C. 751, which includes failure to return to custody after an authorized release, 18 U.S.C. 4082(a),

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[1] Although the state court initially sentenced petitioner to six months in jail (which was stayed), 30 months of probation, and a fine, his probation was subsequently revoked, and he was resentenced to five years of imprisonment. He spent much of his sentence in segregated confinement because of his violence while in prison. J.A. 113-114.

is a "crime of violence" under Sentencing Guidelines § 4B1.2(a) because it "involves conduct that presents a serious potential risk of physical injury to another." 310 F.3d at 553-554. Courts of appeals, including the Seventh Circuit, have interpreted the ACCA's "violent felony" provision to have the same meaning as the Guidelines "crime of violence" provision because the two provisions have materially identical language. See, *e.g.*, *United States* v. *Upton*, 512 F.3d 394, 404 (7th Cir. 2008), petition for cert. pending, No. 07-1024 (filed Mar. 31, 2008).

Bryant rejected the argument that a court should assess a particular defendant's manner of committing the escape, which, in that case, was failing to return to a halfway house after work release. 310 F.3d at 552-554. The *Bryant* court concluded that "every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so." *Id.* at 553 (brackets omitted) (quoting *United States* v. *Franklin*, 302 F.3d 722, 724 (7th Cir.), cert. denied, 537 U.S. 1095 (2002), and *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)).

Because petitioner had three prior convictions for a violent felony or serious drug offense, the district court concluded that he was subject to the ACCA's 15-year mandatory minimum. See J.A. 52, 54, 128. Applying the advisory Sentencing Guidelines, the court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. J.A. 60.

4. The court of appeals affirmed petitioner's sentence, rejecting his argument that failure-to-report escape is not a "violent felony" under the ACCA. J.A. 90-95. Relying on its prior decision in *United States* v.

Golden, 466 F.3d 612 (7th Cir. 2006), petition for cert. pending, No. 06-10751 (filed Apr. 9, 2007), the court held that failing to report for custody, like escaping from custody, "involves conduct that presents a serious potential risk of physical injury to another." J.A. 91. *Golden* held that a conviction under Wisconsin law for failing to report to jail, Wis. Stat. Ann. § 946.425(1m)(b) (West 2005), qualifies as a "violent felony" under the ACCA. 466 F.3d at 615. The court concluded that the risk that failure to report for custody will lead to physical injury is essentially the same as the risk that direct escape from custody will have that result. See *id.* at 614. The court explained that, in both cases, law enforcement officers will attempt to capture the fugitive, a convicted offender who knows that the future holds only incarceration. *Ibid.* Thus, the court reasoned, both offenses create the same potential for a violent confrontation between the offender and law enforcement officials attempting to recapture him. *Ibid.*

In this case, the court of appeals expressed regret that it did not have statistics conclusively establishing the frequency of violence in failure-to-report escapes. J.A. 93-95. But the court noted that *Golden* had squarely held that failure-to-report escape is a "violent felony" under the ACCA and that "[t]he other courts of appeals," except the District of Columbia Circuit—which had reserved the issue—and the Ninth Circuit, were "in accord." J.A. 91-92 (citing cases).[2] The court of appeals

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[2] Although the District of Columbia Circuit had declined to resolve the issue in the decision cited by the court of appeals, see *United States* v. *Thomas*, 333 F.3d 280 (2003), the District of Columbia Circuit later agreed with the majority view that any escape, including a failure to report or return, is a "crime of violence" and a "violent felony." See *United States* v. *Thomas*, 361 F.3d 653, 658-660 (2004) (holding that

therefore held that petitioner was subject to an enhanced sentence under the ACCA. J.A. 93.[3]

SUMMARY OF ARGUMENT

Petitioner's conviction for escape by knowingly failing to report to a penal institution is a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA) because it "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

A. Like attempted burglary, which was held to be a "violent felony" in *James* v. *United States*, 127 S. Ct. 1586 (2007), failure-to-report escape creates a risk of injury comparable in degree to the risk created by the ACCA enumerated offense of burglary. Just as burglary creates the risk of a violent confrontation between the burglar and someone who comes to investigate, failure-to-report escape creates the risk of a violent confrontation between the escapee and law enforcement officers seeking to recapture him.

Law enforcement agencies make vigorous efforts to recapture prisoners who fail to report, and those efforts have a serious potential to become violent. A felon who

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escape, including "[k]nowingly absenting oneself from custody without permission," is categorically a "crime of violence" under Sentencing Guidelines § 4B1.2(a)), vacated on other grounds, 543 U.S. 1111 (2005), reaffirmed in relevant part by *United States* v. *Cook*, 161 Fed. Appx. 7 (D.C. Cir.), cert. denied, 546 U.S. 913 (2005).

[3] After this Court's decision in *Begay* v. *United States*, 128 S. Ct. 1581 (2008), the Seventh Circuit reversed its position and held that "failure to report to custody" is not a "crime of violence" under Guidelines § 4B1.2(a) and thus presumably also not a "violent felony" under the ACCA. *United States* v. *Templeton*, No. 07-2949, 2008 WL 4140616, at * 5 (Sept. 9, 2008). That decision is incorrect for the reasons stated in this brief. See note 13, *infra*.

has refused to submit to custody is likely to possess a volatile state of mind that may cause him to react violently to police officers and others who confront him. The potential dangerousness of such a confrontation is heightened by the fact that the escapee knows that the future holds only incarceration, which he has already found intolerable. Moreover, failure-to-report escapees are, by definition, recidivist felons, and they often have serious criminal records, including convictions for violent crimes. Petitioner, who has prior convictions for robbery, aggravated battery, and cocaine distribution, well illustrates this concern.

B. Failure-to-report escape also satisfies the additional requirement for qualification as a "violent felony" that this Court recognized in *Begay* v. *United States*, 128 S. Ct. 1581 (2008). It is similar "in kind" to the enumerated crimes because it is "purposeful, violent, and aggressive" in the same way as burglary. *Id.* at 1585-1586.

Failure-to-report escape is purposeful like burglary because it requires a mental state of knowledge or intent. There is no sound reason to exclude knowing violations from the ACCA's scope. At least two enumerated offenses require only a mens rea of knowledge, as do numerous crimes that are obviously "violent felonies," such as knowingly using a chemical weapon, 18 U.S.C. 229, and knowingly derailing a train, 18 U.S.C. 1992. Failure-to-report escape is also violent and aggressive in the same way as burglary. Commission of the offense demonstrates that the offender is willing to risk a closely-related, violent confrontation in which law enforcement officers or others could be injured.

Contrary to petitioner's claim, failure-to-report escape involves far more than "*doing nothing.*" Br. 14.

The escapee must make a conscious decision to disobey a legal obligation to report for custody and to achieve a result—his absence from prison—that contravenes that legal duty. Inaction in the face of a duty *is* an act and one that can result in many violent crimes, including arson and burglary. The deliberate nature of the offense conduct and its creation of a clear risk of a violent result make failure-to-report escape purposeful, violent, and aggressive for purposes of the ACCA.

C. Petitioner contends that courts may not consider potential violence or injury unless it would occur "*during the commission of the offense*," Br. 23, which in his view excludes violence during recapture. But that contention ignores the fact that several enumerated offenses are classified as "violent felonies" because of violence that would occur only after commission of the offense. A prohibition on considering post-offense violence has no support in the ACCA's text and would frustrate its purpose.

Even if there were a requirement that the violence risked by an offense must occur while the offense is ongoing, potential violence during recapture would satisfy that test. Failure-to-report escape is a continuing offense. Because the offense is not complete until the escapee returns to custody, violence during recapture occurs during commission of the offense.

Moreover, the risk of violence during recapture is qualitatively greater than the risk of violence in seeking to apprehend ordinary felons. A person who has failed to report to prison has demonstrated an unwillingness to submit to custody; authorities will virtually always attempt to recapture him; and, because he is a recidivist who often has a serious criminal record, he poses a greater danger than an ordinary criminal suspect.

D. The ACCA's "otherwise" clause cannot be limited to "property crimes." Even under petitioner's definition, at least two of the enumerated offenses—extortion and crimes involving the use of explosives—are not "property crimes." In addition, status as a "property crime" is irrelevant to the ACCA's purpose of identifying offenses that make it more likely that the offender would willingly harm others to achieve his goals. Nor is a "property crimes" limitation supported by the ACCA's legislative history or necessary to avoid rendering the ACCA's first clause superfluous.

Although petitioner claims that a "property crimes" requirement is necessary to avoid purported constitutional problems with the serious-risk inquiry mandated by the ACCA, the constitutional concerns identified by petitioner do not exist. The exercise of judicial judgment to determine whether conduct presents a serious risk of causing harm is a familiar aspect of statutory construction, and the serious-risk inquiry is not more difficult to apply here than in *James* or in other contexts.

E. Finally, the rule of lenity does not apply here. Petitioner does not identify any language in the ACCA that is ambiguous. Instead, he disagrees with the court of appeals' conclusion that a convicted felon's deliberate failure to report to prison creates a "serious potential risk of physical injury to another." That standard, although it sometimes requires close examination and comparison of particular offenses, is not ambiguous. And failure-to-report escape clearly satisfies it.

ARGUMENT

PETITIONER'S CONVICTION FOR ESCAPE BY KNOWINGLY FAILING TO REPORT TO A PENAL INSTITUTION QUALIFIES AS A "VIOLENT FELONY" UNDER THE ARMED CAREER CRIMINAL ACT

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another," or "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). Petitioner's conviction for knowingly failing to report to a penal institution (failure-to-report escape), in violation of 720 Ill. Comp. Stat. 5/31-6(a), qualifies as a "violent felony" under that definition because it "otherwise involves conduct that presents a serious potential risk of physical injury to another."

To qualify under that residual clause, an offense must satisfy a two-part test: First, it must create a potential risk of physical injury to others that is "serious." That requirement means that the offense must create a risk comparable in degree to the risk created by one of the specifically enumerated crimes—burglary, arson, extortion, or crimes involving the use of explosives. See *James* v. *United States*, 127 S. Ct. 1586, 1594, 1596-1598 (2007). Second, the offense must be similar in kind to the enumerated crimes. That requirement means that it must be "purposeful, violent, and aggressive" in the way that the enumerated crimes share those characteristics. See *Begay* v. *United States*, 128 S. Ct. 1581, 1585-1588 (2008). Failure-to-report escape satisfies both

parts of that test because it creates a potential risk of injury to others that is comparable in both degree and kind to the risk created by burglary.

A. Failure-To-Report Escape Presents A Serious Potential Risk Of Physical Injury To Others Comparable To The Risk Posed By Burglary

In *James*, this Court held that an offense presents a "serious" potential risk of physical injury to another if the risk of injury that it creates is comparable in degree to the risk posed by one of the enumerated offenses. See 127 S. Ct. at 1594, 1597-1598 (stating that the enumerated offenses provide "a baseline against which to measure the degree of risk that a non-enumerated offense must 'otherwise' present in order to qualify"). In determining whether the risk posed by a crime is comparable in degree to the risk created by an enumerated offense, the Court follows a "categorical approach." *Id.* at 1593. The Court considers the crime generically, measured by the legal definition of the offense rather than how it was committed on a particular occasion. *Id.* at 1593-1594. The categorical approach does not require that every factual scenario encompassed by the offense present the requisite risk of injury. *Id.* at 1597. Instead, the Court examines "the conduct encompassed by the elements of the offense, in the ordinary case." *Ibid.*

The Court in *James* concluded that the potential risk of physical injury presented by attempted burglary is comparable in degree to the risk posed by the enumerated offense of burglary. The Court noted that "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to

investigate." *James*, 127 S. Ct. at 1594. Attempted burglary, the Court held, creates a similar "risk of violent confrontation." *Id.* at 1595. Considering both the likelihood of confrontation and the likelihood that any confrontation will result in injury, the Court concluded that the risk posed by attempted burglary is similar in degree to the risk posed by burglary. *Id.* at 1599.

Failure-to-report escape likewise presents a potential risk of physical injury to others that is at least comparable in degree to burglary. Like burglary, failure-to-report escape creates a serious risk of a violent confrontation between the offender and others, because law enforcement officers are likely to pursue and attempt to recapture the escapee, who has already demonstrated a willingness to disobey a legal command to submit to custody.

1. A convicted felon's failure to report to prison creates a serious potential risk of a confrontation with law enforcement officers seeking to recapture him

An offender commits failure-to-report escape if he "knowingly fails to report to a penal institution" following conviction of a felony. See 720 Ill. Comp. Stat. 5/31-6(a). That conduct creates a serious risk of a confrontation between the offender and others because the offender's absence from prison triggers efforts by law enforcement to recapture him. *United States* v. *Thomas*, 361 F.3d 653, 660 (D.C. Cir. 2004) (noting that "escape invites pursuit; and the pursuit, confrontation") (quoting *United States* v. *Jackson*, 301 F.3d 59, 63 (2d Cir. 2002)), vacated and remanded on other grounds, 543 U.S. 111 (2005), reaffirmed in relevant part by *United States* v. *Cook*, 161 Fed. Appx. 7 (D.C. Cir.), cert. denied, 546 U.S. 913 (2005). That risk of confrontation is comparable to the risk of confrontation between a burglar and

the occupants of the burgled premises or the police. Indeed, the risk of a confrontation between a failure-to-report escapee and law enforcement officers seeking to recapture him is likely higher than the risk of a confrontation between a burglar and others. A burglar generally goes out of his way to ensure that his offense goes undetected, casing the premises and breaking in only when he is confident that the occupants are not present. Prison officials, in contrast, know immediately when an offender fails to report for confinement, and they generally take prompt action to return him to custody.

The United States Marshals Service informs us that it assigns a law enforcement officer to seek to capture all criminals who fail to report to prison. Accord General Accounting Office, *Federal Law Enforcement: Information on Use of Investigation and Arrest Statistics* 46 (2004) (explaining that the Marshals Service attempts to locate and arrest federal fugitives who have escaped from custody or failed to make a required appearance). State law enforcement officials also make vigorous efforts to recapture offenders who fail to report or to return to prison. See, *e.g.*, New York Dep't of Corr. Servs., *Temporary Release Program: 2007 Annual Report* 3 (2007) (stating that prison officials are "committed to apprehending absconders [from temporary release] as quickly as possible"); California Dep't of Corr. & Rehab., *Annual Escape Report: Calendar Year 2007* at 10 (2008) (indicating that the average recapture rate for all escapees over the past 30 years has been 99.1%); New York Dep't of Corr. Servs., *Comparison of Temporary Release Absconders and Non-Absconders: 1993-1994* at v (1995) (N.Y. Absconder Report) (observing that "[m]ost inmates [who absconded from temporary

release] were returned to the Department involuntarily").

Nationwide data indicate that approximately 75% of all escapees are recaptured. Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 282 (2005). The recapture rate for absconders from work release programs is 70%. *Ibid.* The fact that the federal government and the States take action to recapture all escapees, including those who fail to return to prison, is not surprising considering that the United States, the District of Columbia, and at least 36 States deem failure to return to be a form of escape or punish it as severely.[4]

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[4] See 18 U.S.C. 751(a), 4082(a); Ala. Code § 14-8-42 (LexisNexis 1995); Ariz. Rev. Stat. Ann. § 13-2501(4) (2001); Cal. Penal Code §§ 4530(c), 4532(d) (West 2000); Colo. Rev. Stat. Ann. §§ 17-27-106(1)(a), 17-27.5-104 (2006); Conn. Gen. Stat. Ann. § 53a-169(a)(4) and (5) (2007); *Smith* v. *State*, 361 A.2d 237, 238 (Del. 1976); *Hines* v. *United States*, 890 A.2d 686, 689 (D.C. 2006); Fla. Stat. Ann. §§ 945.091(4), 951.24(4) (West 2001); Ga. Code Ann. § 16-10-52(a)(5) (2007); *State* v. *Kealoha*, 787 P.2d 690, 691 (Haw. 1990); Idaho Code Ann. §§ 20-101C, 20-242(6) (2004); Kan. Stat. Ann. § 21-3809(b)(2) (1995); Ky. Rev. Stat. Ann. § 520.010(5) (LexisNexis 1999); Me. Rev. Stat. Ann. tit. 17-A, § 755(1)(A) (2006); Mass. Ann. Laws ch. 268, § 16 (LexisNexis 2002); Mich. Comp. Laws Ann. § 750.193(3) (West 2004); Minn. Stat. Ann. § 609.485(1) (West 2003); Miss. Code Ann. §§ 97-9-45, 97-9-49(2) (West 2005); Mont. Code Ann. § 45-7-306(2) (2007); Neb. Rev. Stat. Ann. § 28-912(1) (LexisNexis 2003); Nev. Rev. Stat. Ann. § 212.095(1) (LexisNexis 2005); N.H. Rev. Stat. Ann. § 651:24 (LexisNexis 2007); N.J. Stat. Ann. § 2C:29-5(a) (West 2005); N.C. Gen. Stat. Ann. § 148-45(g)(1) (2007); N.D. Cent. Code § 12.1-08-06(1) (1997); Okla. Stat. Ann. tit. 21, § 443(C) (West 2002); Or. Rev. Stat. § 144.500(2)(b) (2007); 18 Pa. Cons. Stat. Ann. § 5121(a) (West 1983); R.I. Gen. Laws § 11-25-4 (2002); *State* v. *Furlong*, 291 A.2d 267, 270 (R.I. 1972); S.C. Code Ann. §§ 24-3-50, 24-3-210(C) (2007); Tenn. Code Ann. § 39-16-601(3) (2006); Tex. Penal Code Ann. § 38.01(2) (Vernon 2003); Utah Code Ann.

Law enforcement officials have good reasons for their forceful efforts to recapture failure-to-report escapees. Like other escapees, failure-to-report escapees frequently have serious criminal records. For example, in the federal system, approximately 72% of all defendants convicted of failure-to-return escape (18 U.S.C. 4082(a)) between 2003 and 2007 had a criminal history score in the top three categories of the Sentencing Guidelines. See App., *infra*, 4a. Approximately 52% had a criminal history score in the top two categories, and 35% were in the highest category. See *ibid.*

Statistics from the States also indicate that non-custodial escapees frequently have serious criminal records, including convictions for violent crimes. See App., *infra*, 5a (76% of Florida prisoners who escaped while on work release between July 1, 2003, and June 25, 2008, were serving time for violent crimes); *id.* at 6a (72% of Massachusetts prisoners who failed to return from work release or other unsupervised activities from January 1, 2003, to June 30, 2008, were serving sentences for violent crimes); *id.* at 7a-8a (47% of North Carolina prison-

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§ 76-8-309(1)(a)(i) and (4)(c)(i) (West 2003); *State* v. *Ammons*, 963 P.2d 812, 814 (Wash. 1998); Wash. Rev. Code Ann. §§ 9A.76.010, 9A.76.110(1) (West Supp. 2007); W. Va. Code Ann. §§ 61-5-10, 62-11A-4 (2005); Wis. Stat. Ann. §§ 303.065(2), 946.42(1)(a), 946.425 (West 2005); Wyo. Stat. Ann. §§ 7-13-702, 7-16-309, 7-18-112 (2007).

Petitioner is therefore incorrect in suggesting (Br. 4-5 n.1) that most States distinguish failure to report or return from custodial escape and punish it less severely. Petitioner is also mistaken in relying on 18 U.S.C. 3146, which criminalizes bail-jumping and similar offenses as well as failure to surrender for service of sentence. Bail-jumping is not equivalent to the escape offense committed by petitioner because bail-jumping does not entail the refusal to submit to custody by someone who has already been found guilty of a crime and duly sentenced to incarceration.

ers who failed to return from work release, home leave, community volunteering, or other outside activities from January 1, 2003, to June 30, 2008, were serving sentences for violent crimes); *id.* at 9a-10a (77% of Pennsylvania failure-to-return escapees from January 1, 2003, to June 24, 2008, were serving sentences for violent crimes); *id.* at 11a (60% of Washington prisoners who failed to return from work release from January 1, 2003, to July 23, 2008, were serving sentences for violent crimes).[5] Moreover, anyone convicted for failure-to-report escape in Illinois has, by definition, previously committed a felony offense. See 720 Ill. Comp. Stat. 5/31-6(a). Petitioner, for example, was serving time for robbery and aggravated battery. J.A. 12-13, 110, 113.

There is thus no support for petitioner's assertion that "it is far less urgent" for law enforcement to pursue escapees who fail to report for imprisonment than those who escape directly from custody. Br. 25. On the contrary, as the courts of appeals have recognized, any escape, no matter what kind, is a serious matter that warrants prompt recapture efforts by law enforcement. See, *e.g.*, *United States* v. *Mathias*, 482 F.3d 743, 748 (4th Cir. 2007), petition for cert. pending, No. 07-61

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[5] This discussion classifies the following offenses as violent crimes: murder, manslaughter, rape, arson, assault, battery, kidnapping, robbery, burglary (including breaking and entering with intent to commit a felony), attempting to elude a police officer, and "other violent crimes." Also included as violent crimes are drug manufacturing, drug distribution, and possession of drugs with intent to distribute them, because those offenses, unlike simple possession, indicate involvement in the drug trade, which is closely associated with violence. If drug manufacturing and distribution crimes were not included, the percentage of convictions for violent crimes would range between 40% (Washington) and 56% (Massachusetts). See App., *infra*, 4a-11a.

(filed July 2, 2007); *United States* v. *Franklin*, 302 F.3d 722, 724 (7th Cir.), cert. denied, 537 U.S. 1095 (2002).

2. A confrontation between an escapee and law enforcement officers seeking to recapture him has a serious potential to become violent

Efforts to recapture failure-to-report escapees pose a serious potential risk of becoming violent. "[J]ust as the cautious burglar may be startled by the unexpected return of the homeowner," a failure-to-report "escapee may suddenly be confronted by police officers sent to apprehend him, leading to injury to the officers or bystanders." *Thomas*, 361 F.3d at 660. In the same way that a burglar's nervousness about being in a confined, foreign environment may lead him to react violently upon confrontation, a convicted felon who has refused to submit to lawfully imposed custody is likely to experience a number of supercharged emotions that may cause him to feel threatened by those who confront him and therefore to resort to violence. See *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) ("[E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so.").

A failure-to-report escapee is particularly likely to use violence to resist recapture because he knows that, if he is recaptured, incarceration is a certainty. *United States* v. *Golden*, 466 F.3d 612, 614 (7th Cir. 2006), petition for cert. pending, No. 06-10751 (filed Apr. 9, 2007). His deliberate failure to report to prison demonstrates that he finds the incarceration that awaits him to be intolerable. Criminals in that situation "are unlikely to calmly succumb to recapture efforts." *Mathias*, 482 F.3d at 748. Moreover, as described above, failure-to-

report escapees generally have serious and violent criminal histories, as petitioner's criminal history well illustrates. And, in Illinois, every failure-to-report escapee is necessarily not only a felon but (by virtue of his escape) a recidivist, characteristics that are indicative of dangerousness. See 720 Ill. Comp. Stat. 5/31-6(a); *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1789 (2008); *Caron* v. *United States*, 524 U.S. 308, 312, 315 (1998).

The risk of violence is further increased because law enforcement officers know of the fugitive's demonstrated hostility to custody and are prepared to protect themselves. Unlike homeowners, who are frequently unarmed when they confront a burglar, law enforcement officers typically carry firearms. And they necessarily seek to apprehend the escapee, while homeowners may only try to drive the burglar away from the property.

Because recapture efforts present a significant potential for violence, "hair-raising recovery efforts by law enforcement officers [are] far from unusual." *Mathias*, 482 F.3d at 748 (citing examples). Case law and newspapers alike contain descriptions of violent confrontations between failure-to-report escapees and law enforcement officers seeking to recapture them. See, *e.g.*, *United States* v. *Eaglin*, 571 F.2d 1069 (9th Cir. 1977) (fugitive who failed to return from temporary release shot at police officers who surrounded his apartment during unsuccessful recapture attempt), cert. denied, 435 U.S. 906 (1978); *State* v. *Johnson*, 245 S.W.3d 288 (Mo. Ct. App. 2008) (fugitive who failed to report to jail shot at police after leading them on high-speed chase); *State* v. *Jones*, 979 P.2d 898 (Wash. Ct. App. 1999) (same); *West* v. *State*, 923 P.2d 110 (Alaska Ct. App. 1996) (fugitive who failed to report to prison blew up his hideout after standoff with state troopers); Alan J. Keays, *Man in*

Plea Deal on Several Charges, Rutland Herald, Dec. 17, 2007, (law enforcement officers and failure-to-return escapee engaged in armed standoff); Joshua Palmer, *Nowhere to Run—Four Agencies Corner Convicted Sex Offender*, Times-News, Sept. 14, 2006 (failure-to-report escapee brandished gun and engaged in two-hour standoff when law enforcement sought to recapture him); *Victim of Police Shooting at Store Was a Fugitive*, San Jose Mercury News, Feb. 15, 2001, at 2B (police encounter with failure-to-report escapee led to gunfire); *Woman Who Fled With Fugitive Receives Suspended Sentence*, Portland Press Herald, Feb. 2, 2001, at 2B (statewide manhunt for failure-to-report escapee culminated in deadly recapture attempt).

Despite this evidence of the serious potential risk that recapture efforts will lead to violence, petitioner argues (Br. 26-27) that violence is unlikely. He contends that, because a failure-to-report escapee necessarily enjoyed some limited freedom to move about the community, a public official must have made a determination that the escapee does not present a significant danger. That argument is fundamentally flawed because any determination that the offender was not considered dangerous enough to warrant secure confinement was made before his escape. The escapee's deliberate decision to disobey the law and evade custody alters significantly the assessment whether he is likely to use force to resist recapture. Cf., *e.g.*, N.Y. Absconder Report 2 (stating that inmates who have committed "abscondence [or] escape" may not further participate in temporary release programs); Va. Code Ann. § 53.1-131(A) (2005) (providing that an offender who exceeds the limits of work release "shall be ineligible for further participation in a

work release program during his current term of confinement").

3. Statistical data is not necessary to demonstrate the existence of a serious potential risk of physical injury to others

Petitioner also argues (Br. 42) that the Court cannot conclude that failure-to-report escape presents a serious potential risk of injury because there is no hard statistical data documenting the magnitude of the risk. That argument is untenable in light of *James*, in which the Court held that attempted burglary presents the necessary risk despite the absence of "hard statistics." *James*, 127 S. Ct. at 1598. Indeed, even the dissent in *James*, which disagreed with the Court's evaluation of the risk presented by attempted burglary, acknowledged that, under the ACCA, courts must decide, "without hard statistics to guide them, * * * the degree of risk of physical injury posed by various crimes." *Id.* at 1608 (Scalia, J., dissenting) (internal quotation marks omitted).

Petitioner cites no evidence that Congress intended the decision whether an offense presents a serious risk to depend on statistical analysis, rather than judicial judgment based on experience and common sense. Indeed, because hard statistical evidence about that risk is seldom available, almost no crimes would qualify as "violent felonies" under the ACCA's residual clause if hard statistical evidence were required. It is difficult to imagine that Congress intended that result when it included that "broad residual provision." *James*, 127 S. Ct. at 1592.

B. Failure-To-Report Escape Is Purposeful, Violent, And Aggressive In The Same Way As Burglary

Failure-to-report escape also satisfies the second requirement for qualification as a "violent felony" under the ACCA's residual clause. In *Begay*, the Court concluded that the presence of the four enumerated offenses, coupled with the use of the word "otherwise," indicates that the residual clause covers only "crimes that are roughly similar, in kind as well as in degree of risk posed," to the listed offenses. 128 S. Ct. at 1585. To qualify as similar in kind, a crime must, like the enumerated offenses, involve "purposeful, violent, and aggressive" conduct. *Id.* at 1586. That similarity among the listed offenses is "pertinent," the Court reasoned, because it relates to the ACCA's "basic purpose[]": identifying prior crimes the commission of which makes it more likely that the offender, later possessing a gun, would use the gun to harm others. *Id.* at 1586-1587.[6]

The Court held that the New Mexico offense of repeatedly driving under the influence of alcohol (DUI) does not involve purposeful, violent, and aggressive conduct because "the offender need not have had any criminal intent at all." *Begay*, 128 S. Ct. at 1586-1587. For that reason, unlike the enumerated offenses of burglary and arson, which involve "intentional or purposeful conduct," a conviction for DUI does not show an increased likelihood that the offender is the kind of person who might deliberately harm others. *Id.* at 1587.

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[6] The Court also clarified that the determination whether a crime is purposeful, violent, and aggressive, like the determination whether it poses a serious risk, is made under the categorical approach. *Begay*, 128 S. Ct. at 1584.

In contrast to DUI, failure-to-report escape involves conduct that is purposeful, violent, and aggressive in the same way as burglary. Failure-to-report escape is purposeful like burglary because it requires a mental state of intent or knowledge. And failure-to-report escape is violent and aggressive like burglary because the offender's failure to report for imprisonment creates the risk of a closely related, violent confrontation. The offender's deliberate decision not to report to prison, despite the clear risk of a resulting confrontation in which others are injured, makes it more likely that he would be willing to harm others to carry out his plans.

1. Failure-to-report escape is purposeful because the offender acts knowingly or intentionally

Unlike the strict-liability offense in *Begay*, failure-to-report escape is a purposeful crime because it requires a mental state of knowledge or intent. See 720 Ill. Comp. Stat. 5/31-6(a). Knowledge and intent are the most culpable mental states under Illinois criminal law. See *id.* 5/4-4, 5/4-5. They are only subtly different: a person acts "knowingly" if he is *aware* that his conduct is practically certain to cause a proscribed result, whereas a person acts "intentionally" if he affirmatively *desires* that result. Compare *id.* 5/4-5 with *id.* 5/4-4. As this Court has explained, that distinction is not important in most crimes because "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results." *United States* v. *Bailey*, 444 U.S. 394, 404 (1980) (citation omitted).

Petitioner suggests (Br. 15) that failure-to-report escape does not satisfy *Begay*'s "purposeful" requirement because the crime can be committed knowingly as well as intentionally. But there is no sound reason for

excluding knowing violations from the scope of the ACCA's residual clause. The distinction between intent and knowledge is irrelevant to the ACCA's purpose because both mental states evince a deliberate decision to cause a prohibited result. For example, the arsonist who sets a fire knowing that a building will burn—whatever his purpose may have been—has willingly created a risk of injury to others. That deliberate decision is what increases the probability that the offender, if he later possessed a gun, would use it to harm others. Petitioner does not identify any court of appeals that has held that knowing offenses are not "purposeful" under *Begay*, nor are we aware of any. At least one court of appeals has held to the contrary. See *United States* v. *Williams*, 529 F.3d 1, 3, 7 (1st Cir. 2008).

A requirement that a crime be committed with the mens rea of intent to qualify as a "violent felony" cannot be reconciled with the enumerated crimes. Congress presumably intended the federal arson offense, 18 U.S.C. 81, to qualify as "arson" under the ACCA, but the federal offense may be committed with a mens rea of knowledge. *United States* v. *Doe*, 136 F.3d 631, 635-636 (9th Cir. 1998), cert. denied, 526 U.S. 1041 (1999); *United States* v. *M.W.*, 890 F.2d 239, 240-241 (10th Cir. 1989). In addition, several federal statutes involving the use of explosives do not require the offender to act with intent. See, *e.g.*, 18 U.S.C. 1992(a)(3) (knowingly placing a destructive device on a mass transportation vehicle with reckless disregard for the safety of human life).

Moreover, an intent requirement would exclude from coverage as "violent felonies" numerous offenses that clearly present a serious risk of physical injury to others and indicate an increased likelihood that the offender would be willing to harm others to achieve his plans.

For example, jail-break escape under federal law and the law of many States requires only a mens rea of knowledge,[7] and, in several more States, the offense may be committed with a mens rea of recklessness.[8] Other crimes that would not qualify as "violent felonies" include knowingly using a chemical weapon, 18 U.S.C. 229, and knowingly derailing a train, 18 U.S.C. 1992. Congress could not have intended to exclude those crimes from coverage under the ACCA.

In his effort to show that failure-to-report escape is not purposeful, petitioner suggests (Br. 14) that the offense could be committed by a defendant who made every effort to report on time but was inadvertently delayed by traffic while traveling to prison. That counter-intuitive suggestion is not correct. The conduct that petitioner describes would not establish a "knowing" violation. Under Illinois law, a person acts with knowledge of a prohibited result only "when he is consciously aware that such result is practically certain to be caused by his conduct." 720 Ill. Comp. Stat. 5/4-5(b). In peti-

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[7] See *Bailey*, 444 U.S. at 408; Alaska Stat. §§ 11.56.300, 11.56.310, 11.56.320, 11.56.330, 11.81.610 (2006); Ariz. Rev. Stat. Ann. §§ 13-2502, 13-2503, 13-2504 (2001); Colo. Rev. Stat. Ann. § 18-8-208 (2006); *Hines* v. *United States*, 890 A.2d 686, 689-690 (D.C. 2006); *Reynolds* v. *Commonwealth*, 113 S.W.3d 647, 651 (Ky. App. 2003); Md. Code Ann., Crim. Law § 9-404 (West 2008); Mo. Rev. Stat. § 562.021(3) (West 1999); *id.* § 575.210(3) (West 1995); Mont. Code Ann. § 45-7-306(2) (2007); *State* v. *Aldrich*, 466 A.2d 938, 941-942 (N.H. 1983); N.J. Stat. Ann. §§ 2C:2-2, 2C:29-5 (West 2005); Wash. Rev. Code Ann. § 9A.76.110 (West 2000).

[8] See Del. Code Ann. tit. 11, §§ 251(b), 6533 (2007); N.D. Cent. Code §§ 12.1-08-06, 12.1-02-02(2) (1997); 18 Pa. Cons. Stat. Ann. §§ 302(c), 5121 (West 1983); Tenn. Code Ann. § 39-11-301(c), 39-16-605 (2006); Tex. Penal Code Ann. §§ 6.02(c), 38.06 (Vernon 2003); Utah Code Ann. § 76-2-102, 76-8-309 (West 2003).

tioner's example, the hapless traveler never acts or decides not to act while aware that his decision will cause him to be late to prison. Indeed, because the hypothetical defendant has made reasonable efforts to report on time, his failure to report would not even establish the less culpable mental states of "recklessness" or "negligence" under Illinois law. See *id.* 5/4-6, 5/4-7. It necessarily follows that the defendant would not satisfy the more demanding mental state of knowledge. See, *e.g.*, *People* v. *Higgins*, 229 N.E.2d 161, 163 (Ill. Ct. App. 1967) ("[O]ffenses involving the mental state of 'intent' or 'knowledge' require[] a higher degree of mental culpability than an offense involving the mental state of 'recklessness.'").

Petitioner is likewise incorrect in suggesting (Br. 14) that a defendant could commit failure-to-report escape by oversleeping. The failure-to-report statute would apply to a defendant who was asleep at the time he was required to report to prison only if he had earlier "consciously" decided not to report. 720 Ill. Comp. Stat. 5/4-5(b). It is that conscious decision to avoid an imposed term of imprisonment that makes failure-to-report escape purposeful.

2. Failure-to-report escape is violent and aggressive because the offender deliberately commits the crime despite the clear risk of an ensuing violent confrontation

Failure-to-report escape is also "violent" and "aggressive" within the meaning of *Begay*. An offense qualifies as "violent" and "aggressive" if its commission increases the likelihood that the offender would deliberately harm others. See *Begay*, 128 S. Ct. at 1586. An offense may indicate that inclination in one of two ways. First, an offense may indicate the offender's willingness

to inflict injury because the offender knowingly unleashes a force that can directly cause harm to others. For example, a defendant commits the enumerated offense of arson by setting a fire, and a fire can spread quickly and injure others without subsequent human intervention. Alternatively, an offense may indicate the offender's willingness to inflict injury because the offender consciously commits the crime despite the clear risk that it will trigger a violent confrontation in which others may be harmed. The offender's deliberate commission of the crime despite the risk of a closely related, violent confrontation demonstrates his willingness to cause injury to others to achieve his plans.

Burglary is violent and aggressive in the second way. Although the conduct involved in burglary does not in itself cause injury to others, it demonstrates that the offender is willing to risk a closely related, violent confrontation in which law enforcement officers or others might be injured. The commission of burglary thus makes it more likely that the offender might deliberately harm others.

Failure-to-report escape is violent and aggressive in the same way. A knowing failure to report to prison does not in itself cause any physical injury. But the offense conduct, by its nature, creates a clear risk of a confrontation during recapture efforts in which law enforcement officers or bystanders may be injured. The offender's deliberate decision not to report to prison despite the risk of that closely related, violent confrontation makes it more likely that he would willingly harm others.

3. Failure-to-report escape is not disqualified from being a "violent felony" merely because it involves the failure to comply with a legal duty

Petitioner contends (Br. 14-19) that failure-to-report escape cannot qualify as purposeful, violent, and aggressive because it "involves *doing nothing*" (Br. 14) and is "committed by *inaction*" (Br. 19). That characterization of the offense is not accurate. It ignores the fact that the offender must knowingly achieve a result—his absence from prison—that contravenes his legal duty to submit to custody. See 720 Ill. Comp. Stat. 5/31-6(a). As discussed above, the "knowing" requirement means that the offender must make a conscious decision to fail to comply with his duty. See pp. 25-26, *supra*; 720 Ill. Comp. Stat. 5/4-5(b). Because he must make a conscious decision to achieve that result, his conduct is not fairly described as "doing nothing" or "inaction." Whether he takes a plane to the other side of the globe, hides out in a hotel room under an assumed name, or simply remains at home is irrelevant. Whatever means he uses to cause his absence from prison, the offender is deliberately acting in contravention of his legal duty to report.

That kind of deliberate failure to comply with a legal duty can be purposeful, violent, and aggressive. Criminal law considers the refusal to comply with a duty to act to be equally culpable as an affirmative act. See 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.1, at 422 (2d ed. 2003) (LaFave); Model Penal Code § 2.01(1) (1985), *reprinted in* 3 LaFave App. 277. Many violent crimes—most obviously murder and manslaughter—may be committed by the failure to comply with a legal duty. See 2 LaFave § 14.1; *id.* § 15.4. Thus, a ship captain who deliberately decides to let a sailor drown or a railroad switchman who decides to allow two trains to

collide, killing the passengers, by failing to switch one of the trains to another track commits criminal homicide. See 1 LaFave § 6.2(e), at 448 (noting that "one's failure to act to save someone toward whom he owes a duty to act is murder if he knows that failure to act will be certain or substantially certain to result in death or serious bodily injury"). Indeed, at least two of the enumerated offenses may be committed by the failure to comply with a legal duty. A defendant's failure to put out a fire that he accidentally started qualifies as arson if he intends to cause the building to burn down. See *ibid.* And burglary may be committed by the failure to leave a building that one lacks permission to occupy. See *Taylor* v. *United States*, 495 U.S. 575, 598 (1990).

In all these situations, the deliberate nature of the offense conduct and its creation of a clear risk of ensuing violence make the crime purposeful, violent, and aggressive. Failure-to-report escape is purposeful, violent, and aggressive for the same reasons.

C. Courts May Consider Potential Violence During Recapture In Deciding Whether Failure-To-Report Escape Is A "Violent Felony"

Petitioner argues (Br. 19-24) that courts may not consider potential violence during recapture in deciding whether failure-to-report escape (or any escape, for that matter) qualifies as a "violent felony." That argument is unsound.

1. Whether the violence triggered by an offense occurs during commission of the offense itself or afterwards is irrelevant

Petitioner first contends (Br. 19-21, 23) that courts may not consider any potential violence or injury, no matter how closely related to the offense, unless it would

occur "*during the commission of the offense.*" Br. 23. That contention lacks any support in the either the text or the purposes of the ACCA.

Petitioner's contention cannot be squared with the ACCA's text because the injury risked by the enumerated crimes often occurs after they are complete. In many crimes involving use of explosives, for example, any injury to others would occur only once the crimes have already been committed. See, *e.g.*, 18 U.S.C. 2275 ("plac[ing]" bombs or explosives in or upon a vessel with intent to injure the vessel or persons on board); 18 U.S.C. 2332f(a) ("plac[ing]" or "attempt[ing]" to "place[], discharge[], or detonate[]" an explosive device in a public place). Similarly, arson is complete when a building has been set on fire or burned, see, *e.g.*, 18 U.S.C. 81, but any injury to persons often occurs afterwards when the fire spreads or creates a smoke hazard.

The same is true of the enumerated crimes that are violent and aggressive because the offender consciously commits them despite the risk of a closely related, violent confrontation. In most States, a defendant commits the crime of extortion by making a *threat* with the intent to acquire something of value. See *James*, 127 S. Ct. at 1604 (Scalia, J., dissenting) (citing 3 LaFave § 20.4(a), at 199); James Lindgren, Blackmail and Extortion *in* 1 *Encyclopedia of Crime and Justice* 102, 104 (2d ed. 2002) (Lindgren). That common, contemporary understanding of extortion presumably provides the definition of generic "extortion" under the ACCA. See *Taylor*, 495 U.S. at 592-598. And, under that definition, any injury to others would occur after the offense is complete, when the offender decides to carry out the threat that he has made. The potential violent confrontation in burglary also may occur after the offense is complete. The

conduct necessary to commit generic burglary is entering or remaining without permission in a building with intent to commit a crime. *Id.* at 598. A violent confrontation between the burglar and an occupant or police officer may often occur only after the defendant is no longer in the building. Indeed, when the Court assessed the risk posed by attempted burglary in *James*, it expressly considered the risk of violence in a confrontation occurring after the crime is completed. See 127 S. Ct. at 1599 (considering the risk of violence when an officer or homeowner pursues a would-be burglar following an attempted burglary).

A prohibition on considering injuries that occur after commission of the offense also has no support in the remaining text of the ACCA. As petitioner notes (Br. 20), the ACCA refers to the "conduct" "involve[d]" in the offense. 18 U.S.C. 924(e)(2)(B)(ii). But the ACCA does not require the offense conduct to involve "potential physical injury." Instead, it requires the conduct to involve a "potential risk of physical injury." *Ibid.* Thus, the offense conduct need not itself entail potential injury but need only create a potential *risk* that injury will follow. That conclusion is reinforced by the absence of any language requiring that the injury occur "in the course of committing the offense." Congress included that precise language when defining a "crime of violence" under 18 U.S.C. 16(b). Its decision not to include similar language in the ACCA is fatal to petitioner's position.[9]

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[9] Petitioner also errs in asserting (Br. 20) that his proposed rule is required by the "'categorical' approach" to the ACCA. That approach requires consideration of "the conduct encompassed by the elements of the offense." *James*, 127 S. Ct. at 1597. But it says nothing about what the offense conduct must entail. The text of the ACCA tells us that: the offense conduct must create a "serious potential *risk* of physical injury,"

A prohibition on considering injuries occurring after commission of the offense also would not advance the ACCA's purpose. As petitioner acknowledges, that purpose is to identify crimes that demonstrate that the offender is willing to engage in conduct "where the risk of harm to others is consciously known." Br. 21. That goal is best served by taking into account all harm that may result from an offense so long as the offense conduct creates a clear risk that the harm will occur. Whether the harm will occur during commission of the offense itself or in its immediate aftermath reveals nothing about the offender's willingness to injure others. Indeed, petitioner's proposed limitation would frustrate the ACCA's purpose. It would exclude an obviously violent crime like placing a biological toxin in a mass transportation vehicle with the intent to endanger the safety of another person, 18 U.S.C. 1992(a)(2), because any injury to others would occur only after the toxin had been placed on the vehicle. That cannot be what Congress intended.

Contrary to petitioner's contention (Br. 21), considering violence that follows the offense is fully consistent with the statement in the government's brief in *Begay* that an offender's "subsequent volitional choice (only tangentially related to the offense . . .)" should not be considered in evaluating whether the offense indicates his willingness to harm others. U.S. Br. at 21, *Begay* (No. 06-11543). That unremarkable proposition concerns post-offense conduct that is "only tangentially related to the offense." *Ibid.* It does not mean that courts may never consider harm caused by human conduct that occurs after the offense. If that were the case,

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regardless of when that injury would occur. 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added).

burglary and extortion would not qualify as "violent felonies," because neither results in injury absent volitional, violent conduct that takes place after the offense has been committed. The inclusion of burglary and extortion as enumerated offenses makes clear that potential violent conduct following the offense may be considered, provided that the potential violence is "closely related" to the offense. *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.). And potential violence is "closely related" to the offense when—as with burglary, extortion, and failure-to-report escape—the offense conduct itself creates a clear risk that the violence will occur.

2. Because failure-to-report escape is a continuing offense, any violence during recapture occurs during commission of the offense

Even if there were a requirement that the violence risked by an offense must occur while the offense is ongoing, potential violence during a recapture attempt would satisfy that test. Illinois—like the federal government, the District of Columbia, and the overwhelming majority of States—treats failure-to-report escape as a continuing offense. *People* v. *Miller*, 509 N.E.2d 807, 809 (Ill. App. Ct. 1987); see *Bailey*, 444 U.S. at 413; *United States* v. *Lancaster*, 501 F.3d 673, 680 (6th Cir. 2007) (stating that only six States do not consider escape to be a continuing offense), petition for cert. pending, No. 07-7987 (filed Nov. 29, 2007); *Craig* v. *United States*, 551 A.2d 440, 440-441 (D.C. 1988). The conduct involved in failure-to-report escape thus includes not only the offender's initial moment of absence but also his ongoing failure to return to custody. *Ibid.* Consequently, any violence that occurs during the attempt to recapture the

escapee "occurs *during the commission of the offense.*" Pet. Br. 23.

Petitioner argues (Br. 24) that courts still should not consider violence during recapture because the continuing nature of failure-to-report escape does not change the minimum conduct necessary to satisfy the offense elements. Whether an offense is a "violent felony" does not, however, turn on the minimum conduct necessary to commit it. "Rather, the proper inquiry" focuses on the offense conduct "in the ordinary case." *James*, 127 S. Ct. at 1597. This Court has rejected the proposition that an offense is not violent because there are "unusual cases" in which it "might not present a genuine risk of injury." *Ibid.* It is difficult to think of a more "unusual" case than one in which the defendant commits only the minimum conduct necessary to satisfy the offense elements. Considering only that minimum conduct would not be consistent with the ACCA's text, which refers broadly to the "conduct" "involve[d]" in the offense, not the "minimum" or "essential" conduct. 18 U.S.C. 924(e)(2)(B)(ii). Nor would petitioner's proposed approach further the ACCA's purpose. Because most offenders engage in significantly more than the minimum conduct necessary to commit the offense, considering only the risk presented by that conduct would not accurately capture the risk posed by the typical offender.

Petitioner also suggests (Br. 24 & n.7) that whether escape is a continuing offense should not affect whether it is a "violent felony" because a crime's classification as continuing has nothing to do with the danger posed by the offender. That is incorrect. Failure-to-report escape is classified as a continuing offense because "an escaped prisoner poses a continuing threat to society" during the entire period he remains at large. *Miller*,

509 N.E.2d at 808; see *Bailey*, 444 U.S. at 413. In other words, failure-to-report escape is a continuing offense precisely because of the risk that the offender may resort to violence during recapture. It is therefore entirely appropriate to consider that risk in deciding whether the crime qualifies as a "violent felony."

3. Considering potential violence during recapture would not lead to absurd results

Petitioner further contends (Br. 21-23) that classifying failure-to-report escape as a "violent felony" based on the risk of violence during recapture would lead to absurd results. He argues that adopting that analysis would require the conclusion that every crime is a "violent felony," because every crime presents some risk of a violent confrontation during the offender's arrest. That argument is incorrect. The risk of violence during recapture establishes that failure-to-report escape is violent and aggressive because that risk is closely related to that specific offense. In contrast, the risk of violence that inheres in every arrest is generally not closely related to the crime for which the defendant is arrested. That is true for two reasons.

First, one commits failure-to-report escape by absenting oneself from custody, which is the very obligation that law enforcement officers seek to impose through recapture. In contrast, the conduct involved in the ordinary crime does not include avoidance of custody. Because the offense conduct that constitutes escape inherently involves avoidance of lawful custody, escape and recapture are related in a way that arrest and the typical crime are not.

Second, failure-to-report escape creates a clear risk that there will be a violent confrontation during an attempted recapture, but not every crime creates a compa-

rable risk that there will be a violent confrontation during arrest. Both the risk of a confrontation and the risk that the confrontation will be violent are greater for failure-to-report escape than for ordinary offenses, such as the financial crimes identified by petitioner (Br. 22). The risk of a confrontation is greater because virtually every failure-to-report escape will generate an effort at recapture, while not every criminal offense will provoke an arrest (because many defendants voluntarily surrender). Moreover, unlike the ordinary criminal suspect, the escapee has already indicated both his willingness to defy the criminal justice system and his unwillingness to submit to custody. That means that the escapee is more likely to resist recapture than the typical suspect is to resist arrest. The risk that the escapee will use violence is also greater than the risk that the ordinary suspect will do so. As discussed above, failure-to-report escapees are by definition recidivist felons, characteristics which suggest that they pose a greater danger than ordinary suspects, who have not yet been convicted of a crime. And failure-to-report escapees frequently have very serious criminal records, including convictions for violent crimes. Finally, escapees have more at stake and less to lose by resorting to violence, because they already know that incarceration is a certainty upon recapture.

D. The ACCA's Residual Clause Is Not Limited To Property Crimes

Petitioner proposes (Br. 13, 27-41) that the Court interpret the ACCA's residual clause to contain an additional requirement for a crime to qualify as a "violent felony"—it must be a "property crime." That proposed interpretation is unfounded.

1. The enumerated offenses are not all "property crimes"

Petitioner does not identify anything in the text of the residual clause that refers to "property crimes" or suggests that the clause is limited to those offenses. Instead, he invokes (Br. 13) the canon of *ejusdem generis* and this Court's reasoning in *Begay*. He argues that a "property crimes" limitation is a necessary extension of this Court's ruling in *Begay* that offenses qualifying under the residual clause must be similar in kind to the enumerated offenses, which petitioner asserts are all "property crimes." That argument fails at the outset because not all the enumerated offenses are "property crimes."

Petitioner proffers a multifaceted definition under which an offense qualifies as a "property crime" if the offender either (1) "physically * * * invade[s] property," (2) attempts "to acquire property from another," or (3) releases a force "that necessarily would damage property." Br. 34. The only characteristic uniting those categories is that they each attempt to describe the enumerated offenses in a way that involves property. Even under petitioner's tailor-made definition, however, at least two enumerated offenses fail to qualify.

Crimes involving use of explosives are not property crimes even under petitioner's definition because they do not necessarily threaten to "damage property." Pet. Br. 34. For example, a violation of 18 U.S.C. 2332f(a), which criminalizes the unlawful detonation of an explosive in a place of public use, need not "target[] property." Pet. Br. 30. One can commit that offense by exploding a bomb in an open field and injuring only people. Explosives offenses are included in the ACCA not because they risk damaging property but because the un-

lawful use of explosives shows the offender's willingness to injure others. In a particular case, use of explosives may damage property that is nearby, but that does not mean that every offense involving use of explosives is a "property crime."

Extortion too is not a property crime, even under petitioner's definition, because it does not necessarily require an attempt to obtain "property." The contemporary understanding of extortion (which, as discussed above, controls under the ACCA) entails an effort to obtain "anything of value." 4 Charles E. Torcia, *Wharton's Criminal Law* § 658, at 492-493 (1996); see Lindgren 102 (stating that extortion includes "obtaining property" or "compelling any action against one's will"); *Black's Law Dictionary* 623 (8th ed. 2004) (defining statutory extortion as "obtaining something or compelling some action" by force or coercion); *James*, 127 S. Ct. at 1606 (Scalia, J., dissenting) (defining extortion under the ACCA as "the obtaining of something of value from another" by certain prohibited means); *id.* at 1605 n.2 (noting that the Court had previously defined generic extortion under the Travel Act and RICO as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats" (citations omitted)). Extortion may be used to obtain a favor from a public official, a false confession in judicial proceedings, or the use of a business for money laundering. See, *e.g.*, *United States* v. *Nardello*, 393 U.S. 286, 295 n.13 (1969) (explaining that extortion "is typically employed by organized crime" to "infiltrate legitimate businesses[] and obtain control of labor unions"). Extortion is therefore "generally classified as a crime against the administration of justice or against the conduct of

government, rather than as a crime against property." 3 LaFave § 20.4, at 197-198.[10]

Petitioner relies (Br. 29) on the Model Penal Code for the proposition that extortion is a form of theft and therefore targets property. Model Penal Code § 223.4, *reprinted in* 3 LaFave App. 325. But that provision addresses "theft by" extortion and defines only when a person "is guilty of theft." *Ibid.* It does not account for the full range of conduct prohibited by generic extortion. And it does not reflect the ACCA's purpose of identifying offenses that show an offender's willingness to injure others. A person who obtains a false confession by threat of force shows as much willingness to injure others as a person who extorts some tangible good by the same threat. It is the threat, not the benefit obtained, that is important. There is no good reason to conclude that extortion under the ACCA is a "property crime."

Even the enumerated offense of burglary is a "property crime" only in the sense that it requires unlawful entry into or remaining in a building or structure. See *Taylor*, 495 U.S. at 598. Generic burglary does not require an intent to obtain or to damage property, but

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[10] In *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007), this Court observed that, "[a]t common law, extortion was a property offense committed by a public official who took any money or thing of value that was not due to him under pretense that he was entitled to such property by virtue of his office." *Id.* at 2605-2606 (quoting *Scheidler* v. *NOW*, 537 U.S. 393, 402 (2003)). In neither *Wilkie* nor *Scheidler*, however, did the Court have occasion to consider whether extortion under the ACCA, which is not coextensive with common-law extortion, see p. 30, *supra*; *Taylor*, 495 U.S. at 592-595, is a property crime. Moreover, a "thing of value" can include benefits, such as access to a legislator or the promise of his vote, that do not constitute "property" in ordinary parlance. The Court's passing reference to common-law extortion as a "property crime" therefore does not support petitioner's argument here.

only an "intent to commit a crime." *Ibid.* That crime need not concern property at all. Thus, petitioner can classify burglary as a "property crime" only by expanding his definition to include offenses that *occur at* certain properties, even if the offender does not seek to harm or wrongfully to obtain any property. By so expanding his definition, petitioner undermines his claim that the enumerated offenses are "property crimes" in any meaningful sense.

2. Status as a "property crime" is irrelevant to the ACCA's purpose

Even if petitioner were correct that all the enumerated offenses are "property crimes," that would not justify limiting the residual clause to that category. A "property crimes" limitation would still not be justified under either the canon of *ejusdem generis* or the Court's reasoning in *Begay* because it would not serve the ACCA's purpose—identifying offenses the commission of which makes it more likely that the offender would use a gun to harm others.

Under the canon of *ejusdem generis*, the Court often construes a general term that follows a list of specific terms in a statute as covering only matters similar to the specific terms. But the Court infers a limitation under that principle only if the limitation advances the statute's purpose. See, *e.g.*, *United States* v. *Powell*, 423 U.S. 87, 90-91 (1975); *United States* v. *Alpers*, 338 U.S. 680, 682-683 (1950); *Gooch* v. *United States*, 297 U.S. 124, 128 (1936). Similarly, in *Begay*, the Court held that offenses covered under the residual clause must, like the enumerated offenses, involve purposeful, violent, and aggressive conduct because that "pertinent" common attribute "matters considerably" for achieving "the Act's basic purposes." 128 S. Ct. at 1586-1587.

A limitation to property crimes, in contrast, would do nothing to advance the ACCA's purpose. Crimes that target people, property, or abstract concepts like the "public order" can all involve the potential that the offender will deliberately injure others. Because all those categories of crimes can indicate the offender's willingness to injure others, all of them should be able to qualify as "violent felonies" under the ACCA.

Indeed, a "property crimes" limitation would affirmatively frustrate the ACCA's purpose. It would exclude from coverage offenses like jail-break escape, 18 U.S.C. 751, inciting a riot, 18 U.S.C. 2101, or using a chemical weapon, 18 U.S.C. 229. Those purposeful, violent, and aggressive offenses create a serious potential risk of physical injury to others, and their commission surely makes it more likely that the offender would willingly harm others to achieve his plans. Excluding them from qualification as "violent felonies" because they are not "property crimes" would therefore undermine Congress's aim in enacting the ACCA.[11]

3. *The ACCA's legislative history does not support a "property crimes" limitation*

Contrary to petitioner's contention (Br. 31-33), the ACCA's legislative history also does not support a "property crimes" limitation. This Court has stated that

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[11] Petitioner also errs in arguing (Br. 30-31) that the ACCA's structure supports a "property crimes" limitation. He contends that such a limitation would make the ACCA's residual clause coextensive with the "property crimes" nature of subsection (ii) and distinct from the "crimes targeting persons" in subsection (i). But the distinction between the two subsections arises from the focus of subsection (i) on *elements* involving force and the focus of subsection (ii) on *results* involving potential injury. Subsection (ii) need not be further limited by an artificial "property crimes" constraint.

legislative history is relevant only if it "shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 567-568 (2005). Petitioner has not pointed to any language in the ACCA that even remotely suggests that the residual clause might be limited to property crimes.

In any event, the legislative history does not indicate that Congress intended a "property crimes" limitation. When Congress amended the ACCA in 1986, its purpose was to expand the predicate offenses beyond robbery and burglary. In response to criticism of the initial proposals to accomplish that goal, Congress focused on a compromise bill. That bill expanded the predicate crimes to cover any "violent felony," which the bill defined to include a crime that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. 4885, 99th Cong., 2d Sess. 3 (1986) (quoted in *Taylor*, 495 U.S. at 586). The House Report on the compromise bill stated that subsection (ii) included offenses such as "burglary, arson, extortion, [and] use of explosives," which were offenses specifically mentioned in the congressional hearings. See H.R. Rep. No. 849, 99th Cong., 2d Sess. 5 (1986) (quoted in *Taylor*, 495 U.S. at 587); *Armed Career Criminal Legislation: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 15 (1986) (statement of Mr. Knapp). The enhancement provision as finally enacted followed that form, but added to subsection (ii)

the specific offenses that were mentioned in the House Report.

Petitioner emphasizes that the House Report describes subsection (ii) as "add[ing] all State and Federal felonies *against property* * * * where the conduct involved presents a serious risk of injury to a person." Br. 32-33 (quoting H.R. Rep. No. 849, *supra*, at 5). But the House Report does not indicate that Congress believed "violent felonies" would be *limited* to property crimes. To the contrary, the language of the bill covered the specified crimes as a subset of a broad category. And that broad category was defined in terms of the risk of physical injury, not status as a property crime.

4. The canon against surplusage does not support a "property crimes" limitation

Petitioner also argues (Br. 28-29) that limiting the residual clause to property crimes is required by the canon against surplusage. That is not correct.

Petitioner may be right that every offense that satisfies the ACCA's first clause, because it has "as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), would also satisfy the residual clause, because it would be a purposeful, violent, and aggressive offense that "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii); see *Begay*, 128 S. Ct. at 1585-1586. That does not mean, however, that the first clause is "superfluous." Pet. Br. 28. The first clause provides an objective method for qualifying a prior conviction as a violent felony that does not require a court to engage in the qualitative analysis required by the residual clause. A court can determine that an offense qualifies under the first clause simply by examining the offense elements.

To determine whether the offense qualifies under the residual clause, the court must conduct an analysis of the risk of physical injury that the offense creates. Congress may well have retained the first clause so that courts would not need to engage in the close examination and comparison of crimes whose elements themselves include the use of force.

Furthermore, Congress included the residual clause as a "catch-all" designed to cover violent felonies that might not qualify under the first clause. *James*, 127 S. Ct. at 1592 (quoting *United States* v. *Davis*, 16 F.3d 212, 217 (7th Cir.), cert. denied, 513 U.S. 945 (1994)). In doing so, Congress was likely more concerned about ensuring full coverage than eliminating possible redundancy. Accordingly, "the canon against surplusage has substantially less force when it comes to interpreting a broad residual clause like the one at issue here." *Begay*, 128 S. Ct. at 1591 (Scalia, J., concurring).

In any event, even if the residual clause had to be narrowed to avoid surplusage, that would not justify limiting it to property crimes. Rather, the most natural way to eliminate any surplusage would be to limit the residual clause to offenses that lack the elements specified in first clause. See *Begay*, 128 S. Ct. at 1591 (Scalia, J., concurring) ("[I]t would raise no eyebrows to refer to 'crimes that entail the use of force and crimes that, while not entailing the use of force, nonetheless present a serious risk of injury to another person.'"). That approach would avoid excluding more than what is necessary to eliminate any surplusage.

5. Constitutional concerns do not support a "property crimes" limitation

Petitioner further contends (Br. 34-41) that constitutional problems with the statutorily-mandated inquiry

into whether a crime presents a "serious potential risk of physical injury" require the Court to substitute a "property crimes" limitation. The constitutional quandaries identified by petitioner do not exist, and, in any event, they could not justify the atextual requirement that he proposes.

Petitioner first argues (Br. 39-40) that the serious-risk standard is unconstitutionally vague. This Court already rejected that argument in *James*. The Court explained that, although the standard requires judges to make evaluations that are "sometimes difficult," it is not "so indefinite as to prevent an ordinary person from understanding what conduct it prohibits." *James*, 127 S. Ct. at 1598 n.6. As the Court noted, other federal statutes use "[s]imilar formulations." *Ibid.* (citing 18 U.S.C. 2332b(a)(1)(B) (defining "terrorist act" to include conduct that, among things, "creates a substantial risk of serious bodily injury to any other person")); see 18 U.S.C. 844(f)(2) (providing enhanced penalty for malicious destruction of property by fire or explosive that "creates a substantial risk of injury to any person"); 21 U.S.C. 858 (providing additional penalty where manufacture of controlled substance "creates a substantial risk of harm to human life"). Numerous state statutes also require judicial or jury assessments of the substantiality of risk.[12] The ACCA provides more guidance than many

[12] All or virtually all States have criminal laws that define reckless endangerment, kidnapping, resisting arrest, or other offenses by using some formulation similar to "serious risk of physical injury." See, *e.g.*, Ala. Code § 13A-6-24(a) (LexisNexis 2005) ("substantial risk of serious physical injury"); Alaska Stat. § 11.41.300(a)(2)(B) (2006) (same); *id.* § 11.56.700 ("substantial risk of physical injury"); Ariz. Rev. Stat. Ann. § 13-1201(A) (2001) ("substantial risk of imminent death or physical injury"); *id.* § 13-2508(A)(2) ("substantial risk of causing physical injury"); Ark. Code Ann. § 5-11-103(a) (2006) ("substantial risk of serious

of those statutes on the meaning of its serious-risk standard because the enumerated offenses provide examples of what satisfies that standard.

Petitioner also argues (Br. 40-41) that the serious-risk inquiry violates separation-of-powers principles because it entails "[d]efining crimes and fixing penalties," which are "legislative" rather than judicial functions. Br. 40 (quoting *United States* v. *Evans*, 333 U.S. 483, 486 (1948), and *Ex parte United States*, 242 U.S. 27, 41-42 (1916)). Petitioner's reliance on those cases is unfounded. In *Ex parte United States*, the Court held that a district court exceeds the judicial power when it suspends a sentence that it is required to impose by statute. 242 U.S. at 37-52. This case does not involve a judicial refusal to comply with a statutory command. *Evans* is likewise inapposite. In that case, the Court held that, where Congress has defined a crime but failed to prescribe a penalty for its commission, the Court's selection of a penalty from among several plausible possibilities would be purely speculative and therefore "outside the bounds of judicial interpretation." 333 U.S. at 484-485, 495. In this case, by contrast, Congress has defined the crime in question, and it has fixed the penalties for its commission. This case does not call on the Court to "plug [a] hole in the statute," *id.* at 487; it calls on the Court to interpret the statute. That is a judicial function.

As described above, many federal and state statutes call for a determination whether the risk presented by certain conduct is "substantial" or "serious." Making

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physical injury"); *id.* § 5-13-206(a) ("substantial risk of physical injury"); Cal. Penal Code § 278.6(a)(1)(a) (West 2008) ("substantial risk of physical injury or illness"); Colo. Rev. Stat. § 18-3-208 (2006) ("substantial risk of serious bodily injury").

that determination is well within the constitutional competence of the judiciary. See, *e.g.*, *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994) (describing an inmate's judicially-administered right under the Eighth Amendment to be free from prison officials' deliberate indifference to a "substantial risk of serious harm").

For similar reasons, petitioner is incorrect in arguing (Br. 34-35, 38) that the Court should substitute a "property crimes" limitation for the serious-risk inquiry because the limitation would be easier to administer. The courts are fully capable of conducting an inquiry into the risk presented by a particular crime, and they must do so in numerous contexts. Moreover, a "property crimes" limitation would not be as easy to administer as petitioner suggests. The difficulty in applying such a limitation is illustrated by the dispute in this case about whether several enumerated crimes would qualify. See pp. 37-40, *supra*. In any event, administrability concerns cannot justify rewriting the ACCA by substituting a requirement that the statute clearly does not impose for one that it clearly imposes.

Although petitioner contends that substitution of a "property crimes" limitation for the serious-risk inquiry "comports with how this Court resolved both *Begay* and *James*" (Br. 35-36), that contention is plainly incorrect. *James* "considered only matters of degree, *i.e.*, whether the amount of risk posed by attempted burglary was comparable to the amount of risk posed by the example crime of burglary." *Begay*, 128 S. Ct. at 1585. And the Court in *Begay* confirmed that the ACCA's residual clause requires consideration of whether an offense is "roughly similar" to the enumerated offenses not only "in kind," but also "in degree of risk posed." *Ibid.* The Court did not inquire into whether the crime at issue

was a "property crime" in either case. There is thus no support for the novel "property crimes" limitation that petitioner proposes.

E. The Rule Of Lenity Does Not Apply

Finally, contrary to petitioner's argument (Br. 43), the rule of lenity does not apply here. That rule is "reserved for cases" that, unlike this one, involve a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted).

Petitioner does not identify any language in the ACCA that is ambiguous. Instead, he simply disagrees (Br. 43) with the court of appeals' conclusion that a convicted felon's deliberate failure to report to prison creates a "serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The serious-risk standard, although it sometimes requires careful examination of the nature of particular crimes, is not ambiguous. And, for the reasons discussed above, failure-to-report escape clearly satisfies that standard.[13]

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[13] Although the Seventh Circuit, in a recent case, reversed the position that it took below, see note 3, *supra*, that action provides no reason for this Court to decline to resolve the question presented in this case. The Seventh Circuit's change of position increases, rather than decreases, the existing tension among the courts of appeals, and the Court's resolution of the question presented will definitively determine whether petitioner's sentence is legally authorized. The Seventh Circuit's new position is incorrect for the reasons explained above and, if applied to this case, would improperly require petitioner's mandatory minimum 15-year sentence under the ACCA to be set aside.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2008

APPENDIX A

RELEVANT STATUTORY PROVISIONS

1. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[,]

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 924(e) provides in pertinent part:

Penalties

* * * * *

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of,

or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

* * * * *

3. 720 Ill. Comp. Stat. 5/31-6 (West 2003) provides in pertinent part:

Escape; failure to report to a penal institution or to report for periodic imprisonment

(a) A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement is guilty of a Class 3 felony.

4. 730 Ill. Comp. Stat. 5/5-8-1 (West 2007) provides in pertinent part:

Sentence of Imprisonment for Felony

(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

* * * * *

(6) for a Class 3 felony, the sentence shall be not less than 2 years and not more than 5 years[.]

5. 730 Ill. Comp. Stat. 5/5-5-3 (West 2007) provides in pertinent part:

Disposition

(b) The following options shall be appropriate dispositions, alone or in combination, for all felonies and misdemeanors other than those identified in subsection (c) of this Section:

(1) A period of probation.

(2) A term of periodic imprisonment.

* * * * *

(4) A term of imprisonment.

* * * * *

(6) A fine.

APPENDIX B

FEDERAL AND STATE STATISTICS

United States
Defendants Convicted of 18 U.S.C. 4082 Escape by Criminal History Category, 2003-2007

Criminal History Category	Number of Convicted Defendants	Cumulative Percentage of Total
VI	39	35%
V	19	52%
IV	22	72%
III	31	100%

Data obtained from United States Department of Justice, Criminal Division, Office of Policy and Legislation, July 2008, using data provided by the United States Sentencing Commission

Florida

Escapes from Work Release Centers Between July 1, 2003, and June 25, 2008, by Primary Offense Group/Primary Offense Description

Offense Group	Number
1 -Murder/Manslaughter	9
3 -Robbery	38
4 -Violent, Other	25
5-28 -Burglary, Structure	38
5-29 -Burglary, Dwelling	94
5-30 -Burglary, Armed	5
5-31 -Burglary with Assault	3
5-32 -Burglary/Trespass, Other	2
6-33 -Grand Theft, Other	27
6-34 -Grand Theft, Automobile	35
6-35 -Stolen Property	45
6-36 -Forgery/Counterfeiting	6
6-37 -Worthless Checks	2
6-38 -Fraudulent Practices	8
6-39 -Other Theft/Property Damage	5
7-40 -Drugs, Manufacture/ Sale/Purchase	105
7-41 -Drugs, Trafficking	26
7-42 -Drugs, Possession/Other	51
8 -Weapons	22
9 -Other	39

Data obtained from Florida Department of Corrections, Bureau of Research and Data Analysis, June 2008

Massachusetts
Failure-to-Return Escapees from January 1, 2003, to June 30, 2008, by Incarceration Offense

Incarceration Offense	Number
Armed Robbery	3
Armed Assault	1
Assault and Battery with Deadly Weapon	4
Distribution of Class B Cocaine	2
Possession of Class B Cocaine with Intent to Distribute	1
Possession of Class B Substance	1
Larceny over $250	1
Breaking and Entering with Intent to Commit Felony	1
Unarmed Burglary	1
Theft of a Motor Vehicle	2
Weapons Violation	1

Data obtained from Massachusetts Department of Correction, Fugitive Apprehension Unit, July 2008

North Carolina
Offenders Who Failed to Return from Work Release, Home Leave, Community Volunteering, or Other Outside Activities from January 1, 2003, to June 30, 2008

Crime of Incarceration	Number
Armed Robbery	1
Arson 2nd Degree	1
Assault with Deadly Weapon	2
Burglary 1st Degree	4
Burglary 2nd Degree	2
Cheat - Property/Services	1
Common Law Robbery	2
DWI Level 1	1
Felony B&E	5
Habitual Felon	17
Involuntary Manslaughter	1
Kidnapping 2nd Degree of a Minor	1
Kidnapping 2nd Degree	2
Larceny	1
Larceny (Over $200)	1
Larceny of Motor Vehicle	1
Larceny over $1000	3
Malicious Conduct/Prisoner	1
Misdemeanor B&E	3
Murder Second Degree	2
Possess WITS Schedule II	1
Possessing Stolen Goods	1
Possession of Firearm by Felon	2

Rape First Degree	1
Robbery with Dangerous Weapon	4
Sell Schedule II	1

Data obtained from North Carolina Department of Correction, Policy Development Analyst, July 2008

Pennsylvania
Failure-to-Return Escapees from January 1, 2003, to June 24, 2008, by Offense Type

Offense Type	Number
Access Device Fraud	1
Accident with Death-Inj	1
Aggrvtd Aslt	21
Aggrvtd Aslt with SerBodInj	3
Aggrvtd Aslt with Wpn	1
Burglary	26
Contraband/Cntrl Subst	1
Corrupt Orgns	1
Crim Attempt	1
Crim Conspiracy	9
Crim Trespass	4
Drugs- PWID	61
Drugs-PCS	2
DUI	1
Firearm in public	1
Firearm without license	3
Firearms-Unlawful Possess	1
Forgery	4
Kidnapping	1
Murder 3	2
Prostitution	1
Recvng Stolen Prop	4
Retail Theft	3
Robbery	45
Robbery of Mtr Veh	3
Robbery with SerBodInj	4
Simple Aslt	2
Theft	5
Theft by Deception	1

Theft-Movable Prop	4
VOP	3

Data obtained from Pennsylvania Department of Corrections, Bureau of Planning, Research, Statistics, and Grants, July 2008

Washington
Escape by Failure to Return from Work Release from January 1, 2003, to July 23, 2008

Incarceration Offense	Number
Arson	1
Assault	70
Attempt to Elude	2
Auto Theft	18
Burglary	39
Criminal Mistreatment	1
Manufacture/Delivery of Drugs	69
Other Drugs	69
Fail to Register Sex Offender	1
Maliscious Mischief	1
Murder 2nd	1
Property (Theft/Forgery/PSP)	50
Public Nuisance Sex	1
Robbery	27
Unlawful Possession of Firearm	1

Data obtained from Washington Department of Corrections, Planning and Research, July 2008